

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(i) The Subjects of Equitable Jurisdiction/401. Equity as a system of law.

## **EQUITY (VOLUME 16(2) (REISSUE))**

### **1. EQUITABLE JURISDICTION**

#### **(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION**

##### **(i) The Subjects of Equitable Jurisdiction**

#### **401. Equity as a system of law.**

Equity is the system of law which, prior to the fusion of the administration of law and equity<sup>1</sup> effected by the Supreme Court of Judicature Acts 1873 and 1875<sup>2</sup>, was administered by the former Court of Chancery. Those Acts emphasised, rather than diminished, the importance of the principles which made up the former system of equity jurisdiction<sup>3</sup>.

<sup>1</sup> 'The two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters': Ashburner, *Principles of Equity* (2nd Edn, 1933) p 18. This statement represents the orthodox view, although there are dicta that law and equity themselves are fused: see eg *Errington v Errington and Woods*[1952] 1 KB 290 at 298; sub nom *Errington v Errington*[1952] 1 All ER 149 at 155, CA, per Denning LJ; *United Scientific Holdings Ltd v Burnley Borough Council*[1978] AC 904 at 924, [1977] 2 All ER 62 at 68, HL per Lord Diplock and at 944-945 and at 83-84 per Lord Simon of Glaisdale. See also Megarry and Wade *Law of Real Property* (6th Edn, 2000) p 103; PH Pettit *Equity and the Law of Trusts* (9th Edn, 2001) pp 9-11; Snell's *Principles of Equity* (30th Edn, 2000) p 15.

<sup>2</sup> The Supreme Court of Judicature Acts 1873 and 1875 were replaced by the Supreme Court of Judicature (Consolidation) Act 1925, which was itself with amendments consolidated with other enactments in the Supreme Court Act 1981. See further PARA 496 post; and COURTS vol 10 (Reissue) PARA 601.

<sup>3</sup> For the purpose of understanding these principles, it is necessary to make frequent reference to the practice of the former Court of Chancery and from time to time to make some mention of the history of the system. The importance of an historical approach to the principles of equity was emphasised in *Re Diplock, Diplock v Wintle*[1948] Ch 465 at 481-482, [1948] 2 All ER 318 at 326, CA, per Lord Greene MR: 'Nevertheless, if the claim in equity exists, it must be shown to have an ancestry founded in history and in the practice and precedents of the courts administering equity jurisdiction. It is not sufficient that, because we may think that the "justice" of the present case requires it, we should invent such a jurisdiction for the first time'. *Re Diplock, Diplock v Wintle* supra was affd sub nom *Ministry of Health v Simpson*[1951] AC 251, [1950] AC 251, [1950] 2 All ER 1137, HL. But too rigid a view is hardly consistent with the development of what is now known as a freezing injunction (previously a 'Mareva injunction' from *Mareva Cia Naviera SA v International Bulkcarriers SA*[1980] 1 All ER 213n, [1975] 2 Lloyd's Rep 509, CA); and see *Soinco SACI v Novokuznetsk Aluminium Plant*[1998] QB 406, [1997] 3 All ER 523 (affd [1998] 2 Lloyd's Rep 337, CA); *Kleinwort Benson Ltd v Lincoln City Council*[1999] 2 AC 349 at 377-378, [1998] 4 All ER 513 at 534-535, HL, per Lord Goff of Chieveley.

**UPDATE**

**401 Equity as a system of law**

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(i) The Subjects of Equitable Jurisdiction/402. Growth of the former Court of Chancery.

## **402. Growth of the former Court of Chancery.**

The former Court of Chancery had its origin in the reign of Edward II or earlier. Its aid was required because of the deficiencies of the common law courts. Powerful litigants, by bribery or intimidation of juries, could render the proceedings of such courts abortive. In cases where the courts were thus at fault, petitions for redress were presented to the King or his Council, and convenience required that these should be dealt with by a special tribunal. For this purpose the Chancellor and the officials in the Chancery, chief among them the Master of the Rolls<sup>1</sup>, were available. Under the early Plantagenet kings they formed an important department of state; they were entrusted with the issue of the original writs which set the ordinary courts in motion; and the Chancellor, as a member of the Council, already exercised to some extent an ordinary jurisdiction similar to that of the common law courts, which was the foundation of the subsequent common law jurisdiction of the Court of Chancery<sup>2</sup>.

The separate existence of the Court of Chancery probably arose from the practice of petitions being referred from the Council to the Chancellor. This was done under Edward I; the Chancery was becoming an independent court under Edward II and Edward III; and from the latter reign onwards its existence was fully established and its progress continuous<sup>3</sup>.

The encroachments of the Court of Chancery were a matter of continual, though ineffectual, protest in Parliament throughout the fifteenth century<sup>4</sup>. In addition to the original reasons for the establishment of the court, by its recognition and enforcement of trusts in their old form of uses<sup>5</sup> it had enabled owners of property to dispose of it freely by will and the court had become indispensable. The Court of Chancery also had undoubted jurisdiction at this time in fraud, accident and breach of confidence<sup>6</sup>. The sixteenth century found it in similar conflict with the common law courts over the right which it claimed to override their judgments by injunction<sup>7</sup>, and the conflict was not terminated until James I decided in favour of the Court of Chancery<sup>8</sup>. The reports commence in the middle of the same century and incorporate a few rulings of earlier date, and thenceforward the system of equitable jurisdiction was continuously developed under the Chancellors<sup>9</sup>.

1 The Master of the Rolls was formerly called 'Clerk of the Rolls': see 1 Holdsworth's History of English Law (7th Edn) 418-421. The Chancellor's jurisdiction was often delegated to the Master of the Rolls, who thus became the Chancellor's deputy: 1 Holdsworth's History of English Law (7th Edn) 419-420; Kerly, History of Equity 60, 127. In time he exercised a regular jurisdiction, subject to appeal to the Chancellor: see 3 Geo 2 c 30 (Orders etc of the Master of the Rolls) (1729) (repealed). The first Vice-Chancellor was appointed in 1813, and two more were added in 1842 by the Court of Chancery Act 1841 s 19 (repealed). As to the staff of the court, and as to the defects in its organisation and its reconstitution in the nineteenth century, see 1 Holdsworth's History of English Law (7th Edn) 421 et seq; Kerly, History of Equity 59, 127; and cf *Ex p Six Clerks* (1798) 3 Ves 589 at 599-600; Masters of the Chancery, 1 Hargrave's Law Tracts 293. In 1852 the masters were abolished; the Master of the Rolls and the Vice-Chancellors were empowered to sit in chambers, and two chief clerks were assigned to each; and conveyancing counsel to the court were appointed: Court of Chancery Act 1852 (repealed). As to the present organisation of the Chancery Division of the High Court see COURTS vol 10 (Reissue) PARA 603 et seq.

2 4 Co Inst 79-80; 1 Spence's Equitable Jurisdiction of the Court of Chancery 336; Kerly, History of Equity 52-56; 1 Holdsworth's History of English Law (7th Edn) 398, 449.

3 See 1 Pollock and Maitland's History of English Law (2nd Edn) 193, 196, 197; Kerly, History of Equity 27-31; 1 LQR 443 (Common Law and Conscience in Chancery); Select Cases in Chancery (Selden Society vol 10) xv,

xliv; 1 Holdsworth's History of English Law (7th Edn) 403-408; 1 Spence's Equitable Jurisdiction of the Court of Chancery 335.

4 Kerly, History of Equity 37-45.

5 1 Holdsworth's History of English Law (7th Edn) 454.

6 As to restraint of the unauthorised use of confidential information see PARA 855 post.

7 See Kerly, History of Equity 89, 107-117.

8 See (1616) 21 ER 576-598.

9 The most illustrious were Sir Heneage Finch (Lord Nottingham), 1673-1682 (see 3 Bl Com (14th Edn) 55), known as the 'father of equity'; Lord Hardwicke, 1737-1756; Lord Thurlow, 1778-1792; and Lord Eldon, 1801-1806, 1807-1827. Equitable jurisdiction was exercised by the courts of the Counties Palatine, the Chancery Courts of Lancaster and Durham, which were merged with the High Court by the Courts Act 1971 s 41: see COURTS vol 10 (Reissue) PARA 606. For further authorities as to the early history of the Court of Chancery see Ashburner, Principles of Equity (2nd Edn, 1933) p 20; Milsom, Historical Foundations of the Common Law (2nd Edn, 1981) p 82 et seq. There was also an equity side to the Court of Exchequer, but this jurisdiction was transferred to the Court of Chancery by the Court of Chancery Act 1841 s 1 (repealed).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(i) The Subjects of Equitable Jurisdiction/403. Jurisdiction of the former Court of Chancery.

### **403. Jurisdiction of the former Court of Chancery.**

In certain matters the former Court of Chancery enforced rights which were not in general<sup>1</sup> recognised at law, as in trusts, married women's settled property, and equities of redemption; or gave relief where no relief was available at law, as in relief against penalties and forfeitures. This was known as the exclusive jurisdiction in equity.

In other matters the court enforced rights which were also recognised at law; and it then either gave an alternative and usually a more efficient remedy, as in contract, fraud, mistake, account, partition and partnership, or supplied a remedy to replace a legal remedy which had been lost, as where by accident a plaintiff had lost the means of asserting his remedy at law. This was known as the concurrent jurisdiction.

There was also the auxiliary jurisdiction in equity. In exercising such jurisdiction, the court did not in general itself decide upon the parties' rights, but afforded the benefit of its special procedure either:

- 1 (1) to facilitate the determination of the parties' rights in other courts, as where it compelled discovery of facts or documents, or entertained suits to perpetuate testimony; or
- 2 (2) to secure to the plaintiff, if successful, the fruits of the litigation, as where it protected property, pending litigation, by the appointment of a receiver, or prevented irreparable damage by granting injunctions to restrain the assertion of doubtful rights; or
- 3 (3) to prevent injury to a third person from the conflicting rights of others, as in interpleader.

Moreover, the Court of Chancery exercised an overriding jurisdiction by preventing proceedings in the common law courts from being made the instrument of oppression; this it did by restraining the commencement or prosecution of such proceedings, or the enforcement of judgments under them, as the case might require. A party seeking equitable relief must now seek it in the proceedings before judgment is given; after judgment it is too late to seek relief<sup>2</sup>.

The distinction between the exclusive, the concurrent and the auxiliary jurisdictions, which was never very clearly established in certain details, is technically obsolete<sup>3</sup>. References to it remain, however, in the judgments, and it is for present purposes the most convenient way of showing the scope of equitable jurisdiction.

A purely equitable right, that is to say one which previously came within the exclusive jurisdiction, may still be enforced<sup>4</sup> only by equitable remedies.

1 Devises of equitable estates were recognised at common law: *Pawlett v A-G* (1667) Hard 465 at 469; and see *Anon* (1679) 2 Cas in Ch 8; *Blake v Foster* (1814) 2 Ball & B 387; revsd (1823) 4 Bligh 140n.

2 *TC Trustees Ltd v JS Darwen (Successors) Ltd* [1969] 2 QB 295 at 302, [1969] 1 All ER 271 at 273, CA, per Lord Denning MR.

3     le owing to the fusion of jurisdictions by virtue of the Supreme Court of Judicature (Consolidation) Act 1925 s 36 (repealed): see PARA 496 et seq post. As to the exclusive jurisdiction in equity see PARAS 406-407 post; as to the concurrent jurisdiction see PARA 408 et seq post; and as to the auxiliary jurisdiction see PARA 469 et seq post.

4     le subject to the Supreme Court Act 1981 s 50 (power to award damages in lieu of, or in addition to, an injunction or specific performance): see DAMAGES vol 12(1) (Reissue) PARA 825; SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 959.

## **UPDATE**

### **403 Jurisdiction of the former Court of Chancery**

NOTE 4--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(ii) The Nature of Equity/404. Relationship of equity to common law.

## (ii) The Nature of Equity

### 404. Relationship of equity to common law.

Early authorities refer to 'conscience', 'reason' and 'good faith' as the principles which guided the former Court of Chancery, and the term 'equity' implies a system of law which is more consonant than the ordinary law with opinions current for the time being as to a just regulation of the mutual rights and duties of persons living in a civilised society<sup>1</sup>. There was never a time in the history of the court, however, when the Chancellor was at liberty to follow generally either his own, or professional or common, opinions as to what was right and convenient. Law and the administration of law are, in all systems, intended as a means of attaining justice, but the means are imperfect. The special imperfections of mediaeval common law were, as to the law itself, that its rules were too strict<sup>2</sup>, and that it did not cover the whole field of obligations; as to its administration, that it had no effectual means of extracting truth from the parties, that its judgments were not capable of being adapted to meet special circumstances, and that they were often unenforceable through the opposition of the defendant, or were turned into a means of oppression.

In so far as it remedied these defects, the Court of Chancery afforded an improved system of attaining justice, but this was the extent of the difference between law and equity<sup>3</sup>. Each had the same object; each attained it only imperfectly, equity somewhat less imperfectly than law. Both were developed in the same way, by decisions given in accordance with precedents and subject to professional criticism. **From the beginning the Court of Chancery acted on the maxim that equity follows the law**<sup>4</sup>; and, in cases where the legal analogy clearly applied, the rule of law was adopted, however harsh it might be<sup>5</sup>.

1 Select Cases in Chancery (Selden Society vol 10) xxx; 1 Spence's Equitable Jurisdiction of the Court of Chancery 408 note (a), 411, 415 note (b). A writ from Henry V to the Chancellor in 1419 directs him to do both right and equity: Select Cases in Chancery (Selden Society vol 10) xxx. Cf the words in 7 Edw 4 (Close Rolls) xxxi: 'according to equity and conscience and to the old course and laudable custom of the same court' (cited in 1 Holdsworth's History of English Law (7th Edn) 406). **In general, however, when the word 'conscience' was used, this denoted the conscience of the defendant, and the court by decree in personam prevented his making an unconscionable use of his rights at common law. This was the ground of injunctions against enforcing judgments at law.** 'When a judgment is obtained by oppression, wrong, and a hard conscience, the Chancellor will frustrate and set it aside, not for any error or defect in the judgment, but for the hard conscience of the party': *Earl of Oxford's Case* (1615) 21 ER 485 at 487 per Lord Ellesmere LC. The correction of the defendant's conscience was the ground of the interference of equity in case of fraud, breach of trust and wrong and oppression generally. See also Maitland, Equity (2nd Edn) 12 et seq. As to the former Court of Chancery see PARAS 401-403 ante.

2 Thus there could be no action on a bond, if lost, since production of the bond was at law essential (see PARA 446 post); an obligor, who paid the debt, but took no receipt and left the bond outstanding, was, moreover, liable to pay over again (Doctor and Student 42). The necessity for equity to correct the excessive strictness of the law was usually put upon the ground that the law was concerned with general rules and could not adapt itself to particular circumstances: 'The cause why there is a Chancery is for that men's actions are so divers and infinite, that it is impossible to make any general law which may aptly meet with every particular act, and not fail in some circumstances' (*Earl of Oxford's Case* (1615) 21 ER 485 at 486 per Lord Ellesmere LC); and see Doctor and Student 52.

3 Law and equity have both the same end, which is to do right (*Earl of Oxford's Case* (1615) 21 ER 485 at 486 per Lord Ellesmere LC), and in some matters, especially in regard to titles to equitable estates, equity followed the law implicitly. Where it differed from the law, this was in order to moderate its rigour, to supply its omissions, to assist the legal remedy, or to relieve against the evasion of the law or the abuse of the legal right: *Lord Dudley v Lady Dudley* (1705) Prec Ch 241 at 244; *Cowper v Earl Cowper* (1734) 2 P Wms 720. It moderated its rigour by giving relief against forfeitures or the loss of documents; it supplied its omissions by exacting conscientious conduct from the defendant when the law recognised no binding obligation; it assisted the legal remedy by discovery and the preservation of property pending suit; it relieved against the evasion of the law by removing technical impediments, such as a satisfied term which prevented dower from attaching; and it relieved against the abuse of rights by granting injunctions to restrain the enforcement of unconscientious judgments. In early days the power or number of the defendants frequently called for the intervention of equity to assist the law, and a relic of this existed in the common clause in equity bills charging combination and conspiracy which lasted until the nineteenth century: Mitford, *Pleadings in Chancery* (5th Edn) 43. As to the early records of the Court of Chancery see *Select Cases in Chancery* (Selden Society vol 10); and as to the grounds of the jurisdiction, and the subjects originally dealt with, see Kerly, *History of Equity* 70-93, 129-153; 1 Holdsworth's *History of English Law* (7th Edn) 395, 466.

4 As to this maxim see further PARAS 554-555 post; and as to the maxims of equity generally see Roscoe Pound's *Cambridge Legal Essays* 'On certain maxims of equity' 259 et seq; and PARA 502 post.

5 *Earl of Bath v Sherwin* (1709) 10 Mod Rep 1 at 3, HL, per Lord Cowper LC; and see PARA 554 post. A judge in equity cannot 'alter the maxims of the common law, for this would be to assume a power paramount to the law'. Thus, as pointed out in *Earl of Bath v Sherwin* supra, equity did not interfere with the singularly harsh doctrine of collateral warranty (Cary 6; and see Co Litt 373a, b). The doctrine was abolished by the Administration of Justice Act 1705 s 21 (repealed). In some matters, however, equity exercised a jurisdiction corrective of the common law (1 Spence's *Equitable Jurisdiction of the Court of Chancery* 409); and it subsequently created the doctrine of separate property of married women in violation of common law principles (1 Spence's *Equitable Jurisdiction of the Court of Chancery* 419).



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(ii) The Nature of Equity/405. Systematisation of equity.

#### 405. Systematisation of equity.

As to matters not ordinarily dealt with at common law, such as trusts and legacies, equity was free to go to new sources of law, and recourse was had to both Roman law and canon law<sup>1</sup>; and for a time, in laying the foundations of a new system of jurisdiction, the Chancellors acted, when necessary, on their own initiative, and made precedents. They made as few innovations on the common law as possible, and the usual course was to disclaim the free following of any such notion as natural justice and to adhere to precedents<sup>2</sup>. By the time that Lord Eldon's chancellorship closed, equity was a system of rules as well settled as ever the common law had been<sup>3</sup>, and it had become incapable of judicial alteration except by the application of old rules to new subjects or to fresh circumstances, a process that is continually happening both at law and in equity<sup>4</sup>.

It is doubtful whether it is any longer open to equity to invent new principles<sup>5</sup>.

1 The exclusion of the Roman law from the common law courts was not followed in Chancery (1 Spence's Equitable Jurisdiction of the Court of Chancery 346-347), although the extent to which it was really used there has been disputed (see Kerly, History of Equity 189). The citation of Justinian's Digest in English courts is discussed in Allen's Law in the Making (7th Edn, 1964) p 272 et seq. As to canon law see ECCLESIASTICAL LAW.

2 'With such a conscience as is only *naturalis et interna* this court has nothing to do; the conscience by which I am to proceed is merely *civilis et politica*, and tied to certain measures': *Cook v Fountain* (1676) 3 Swan 585 at 600 per Lord Nottingham LC. 'Though proceedings in equity are said to be *secundum discretionem boni viri*, yet, when it is asked, *vir bonus est quis* the answer is, *qui consulta patrum, qui leges juraque servat*': *Cowper v Earl Cowper* (1734) 2 P Wms 720 at 753 per Jekyll MR. As to the influence of precedents in Chancery see Kerly, History of Equity 100, 184; 1 Spence's Equitable Jurisdiction of the Court of Chancery 416; Allen's Law in the Making (7th Edn, 1964) 380 Excursus D. In *Fry v Porter* (1670) 1 Mod Rep 300 at 307 per Vaughan CJ, the question was raised whether, since equity was a universal truth, there could be a precedent for it. Equity is not of this nature, and Lord Keeper Bridgman put the matter on a practical ground: 'Certainly precedents are very necessary and useful to us, for in them we may find the reasons of the equity to guide us; and besides, the authority of those who made them is much to be regarded': *Fry v Porter* supra at 307 per Bridgman, Lord Keeper. Lord Macclesfield's opinion was 'never to shake any settled resolution touching property or the title of land, it being for the common good that these should be certain and known, however ill-grounded the first resolution should be': *Wagstaff v Wagstaff* (1724) 2 P Wms 258 at 259; cf *Sparrow v Hardcastle* (1754) Amb 224 at 227; and Lord Nottingham in *Pitt v Hunt* (1681) 1 Vern 18, approving a saying attributed to Walter CB: 'It is no matter what the law is, so it be known what it is'.

3 *Gee v Pritchard* (1818) 2 Swan 402 at 414 per Lord Eldon LC ('the doctrines of this court ought to be as well settled, and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case'); *Davis v Duke of Marlborough* (1819) 2 Swan 108 at 163; *Campbell Discount Co Ltd v Bridge* [1961] 1 QB 445 at 459, [1961] 2 All ER 97 at 103, CA, per Harman LJ ('since the time of Lord Eldon the system of equity for good or evil has been a very precise one, and equitable jurisdiction is exercised only on well-known principles'); and see Kerly, History of Equity 167. For a detailed account of the growth of modern equity see Kerly, History of Equity 184-263; Milsom, Historical Foundations of the Common Law (2nd Edn, 1981) p 82 et seq.

4 A difference between rules of equity and rules of the common law is that the former are not supposed to have been established from time immemorial, but it is possible often to name the chancellors who invented the modern rules of equity and to state when they were introduced, so that older precedents may have become of little value: see *Re Hallett's Estate, Knatchbull v Hallett* (1880) 13 ChD 696 at 710, CA, per Jessel MR; and see PARA 401 note 3 ante.

Among the maxims of equity were the statements that 'equity delights to do complete justice, and not by halves' (*Knight v Knight* (1734) 3 P Wms 331 at 334), and that 'equity will not suffer a wrong to be without a remedy'. The former maxim was expanded into the statement: 'It is the constant aim of a court of equity to do

complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent litigation': Mitford, Pleadings in Chancery (5th Edn) 190. The second maxim, 'equity will not suffer a wrong to be without a remedy', was possibly founded on the protection afforded in equity to trusts. The wrong had to be such that judicial notice could be taken of it, and the maxim is equivalent in equity to the maxim well established at law, *ubi jus, ibi remedium* ('if the plaintiff has a right, he must of necessity have a means to vindicate and maintain it; and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal': *Ashby v White* (1703) 2 Ld Raym 938 at 953 per Holt CJ).

The maxims together appear to have meant no more than that the court would afford a remedy for the invasion of a legal or equitable right. See also *Ryves v Duke of Wellington* (1846) 9 Beav 579.

5 The most forceful exponent of the creative power of equity has perhaps been Lord Denning. 'Equity is not past the age of child-bearing. One of her latest progeny is a constructive trust of a new model. Lord Diplock brought it into the world [in *Gissing v Gissing* [1971] AC 886 at 905, [1970] 2 All ER 780 at 790, HL] and we have nourished it': *Eves v Eves* [1975] 3 All ER 768 at 771, [1975] 1 WLR 1338 at 1341, CA, per Lord Denning MR. See also *Binions v Evans* [1972] Ch 359, [1972] 2 All ER 70, CA; *Cooke v Head* [1972] 2 All ER 38, [1972] 1 WLR 518, CA; *Hussey v Palmer* [1972] 3 All ER 744, [1972] 1 WLR 1286, CA. As to the orthodox view see *Cowcher v Cowcher* [1972] 1 All ER 943 at 948, [1972] 1 WLR 425 at 430 per Bagnall J; *Western Fish Products Ltd v Penwith District Council* [1981] 2 All ER 204 at 218, CA, per Megaw LJ ('the creation of new rights and remedies is a matter for Parliament, not the judges'). Recent cases indicate that the wide view of Lord Denning will not prevail: see eg *Burns v Burns* [1984] Ch 317, [1984] 1 All ER 244, CA; *Grant v Edwards* [1986] Ch 638, [1986] 2 All ER 426, CA; *Midland Bank plc v Dobson* [1986] 1 FLR 171, CA; *Ashburn Anstalt v Arnold* [1989] Ch 1, [1988] 2 All ER 147, CA; *Re Polly Peck International plc (in administration) (No 2)* [1998] 3 All ER 812, CA. In *Metall und Rohstoff v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 at 480, [1989] 3 All ER 14 at 56-57, CA, Slade LJ left open the possibility of a 'remedial constructive trust' and the door was not closed on it by *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961, HL, but no encouragement is to be found in *Re Polly Peck International plc (in administration) (No 2)*, supra.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iii) The Exclusive Jurisdiction in Equity/406. Subjects of the exclusive jurisdiction.

### **(iii) The Exclusive Jurisdiction in Equity**

#### **406. Subjects of the exclusive jurisdiction.**

Trusts<sup>1</sup> formed the leading subject matter of the exclusive jurisdiction in equity<sup>2</sup>; and such jurisdiction extended beyond express trusts to constructive and resulting trusts, and to rights and obligations arising out of fiduciary relationships generally<sup>3</sup>. 'Constructive trust' is here used in its primary sense, that is where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the claimant<sup>4</sup>.

Choses in action and contingent or expectant interests in real property were not assignable under the common law, but were assignable in equity on the ground that the assignment, either in form or in effect, amounted to a declaration of trust, with authority for the assignee to make use of the assignor's name to obtain the benefit of the assignment<sup>5</sup>.

Equity also exercised jurisdiction in respect of liens, including non-possessory liens<sup>6</sup>, and might effectuate claimants' rights through the remedy of an equitable lien or charge<sup>7</sup>. The device of the declaration of charge, which was unknown to the common law, enabled a court of equity to have a wider conception of equitable rights in relation to tracing the money of one person into a mixed fund<sup>8</sup>.

The strictness of the common law in enforcing penalties and forfeitures led to the intervention of equity in order to give relief in certain circumstances<sup>9</sup>.

1 As to the refusal of the common law courts to recognise trusts, and the consequent rise of this exclusive jurisdiction, see PARA 403 ante. The recognition of trusts resulted in the creation of equitable interests in property, and as to these equity had exclusive jurisdiction, although in general it dealt with them in accordance with the rules applicable at common law to legal interests. As to the maxim 'equity follows the law' see PARAS 554-555 post.

2 Charities constituted a special class of trusts, and fell within this jurisdiction: see CHARITIES vol 8 (2010) PARAS 529-537. As to the categorisation of equitable jurisdiction as exclusive, concurrent and auxiliary see PARA 403 the text and note 3 ante.

3 See PARA 851 et seq post; and TRUSTS vol 48 (2007 Reissue) PARA 624 et seq.

4 See *Paragon Finance plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400 at 409, CA, per Millett LJ. This primary sense is to be contrasted with the secondary sense which covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the claimant. This falls within the concurrent jurisdiction: see PARAS 408, 438 post.

5 See Co Litt 232b note 1; Story, *Equity Jurisprudence* s 1040; and CHOSSES IN ACTION vol 13 (2009) PARAS 14 et seq (general rule), 24 et seq (in equity), 72 et seq (by statute). There were certain qualifications to the generality of the proposition stated supra, eg negotiable instruments were assignable and the Crown had power to assign a chose in action.

6 See LIEN vol 68 (2008) PARA 801 et seq.

7 For modern examples of the application of the jurisdiction to find that a transaction gives rise to an equitable charge see *Re Kent and Sussex Sawmills Ltd* [1947] Ch 177, [1946] 2 All ER 638 (equitable assignment by way of security effected in equity but avoided by statute for want of registration); *Re Nanwa Gold Mines Ltd*,

*Ballantyne v Nanwa Gold Mines Ltd*[1955] 3 All ER 219, [1955] 1 WLR 1080 (equity over money subscribed for shares and to be retained provisionally in a separate account).

8 See *Re Diplock, Diplock v Wintle*[1948] Ch 465 at 519-520, [1948] 2 All ER 318 at 346, CA, per Lord Greene MR; affd, but not on this point, sub nom *Ministry of Health v Simpson*[1951] AC 251, [1950] 2 All ER 1137, HL.

9 As to relief against penalties see PARAS 801-803 post; and as to relief against forfeitures see PARAS 804-808 post. To this head of equity jurisdiction may be referred the equitable relief against forfeiture of mortgaged property which gave rise to the equity of redemption: see PARA 605 post; and MORTGAGE vol 77 (2010) PARA 302 et seq.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iii) The Exclusive Jurisdiction in Equity/407. Application of equitable doctrines.

#### **407. Application of equitable doctrines.**

When claims to property had once come within the jurisdiction of a court of equity, whether on the ground of trust or otherwise, the court applied its own doctrines in order to adjust the parties' rights in accordance with the intention of settlors and testators or to prevent injustice<sup>1</sup>. Hence the exclusive jurisdiction of equity included the application of the doctrines of conversion<sup>2</sup>, election<sup>3</sup>, satisfaction<sup>4</sup>, and marshalling of assets and securities<sup>5</sup>.

1 'Equity, in developing one of its doctrines, refuses to allow itself to be fettered by the concept upon which the doctrine is based if to do so would make the doctrine unfair or unworkable. After all, it is of the essence of a doctrine of equity that it should be equitable, and, I may add, that it should work: equity, like nature, does nothing in vain': *Brunner v Greenslade* [1971] Ch 993 at 1006, [1970] 3 All ER 833 at 842 per Megarry J.

2 See PARA 701 et seq post.

3 See PARA 724 et seq post.

4 See PARA 739 et seq post.

5 See PARA 758 et seq post.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/A. NATURE OF THE CONCURRENT JURISDICTION/408. Grounds of the concurrent jurisdiction.

## **(iv) The Concurrent Jurisdiction in Equity**

### ***A. NATURE OF THE CONCURRENT JURISDICTION***

#### **408. Grounds of the concurrent jurisdiction.**

In certain matters which were ordinarily the subject of jurisdiction at law, equity exercised a concurrent jurisdiction<sup>1</sup>. This was based on various circumstances:

- 4 (1) that the legal remedy was not available;
- 5 (2) that the equitable remedy was more efficient; or
- 6 (3) that the procedure in equity afforded advantages which were not attainable at law.

In addition, the former Court of Chancery could mould its decrees so as to adjust the parties' rights in a manner not practicable at law, and, by bringing all the parties interested before it, could avoid multiplicity of suits<sup>2</sup>. Upon some one or more of these considerations was based the jurisdiction in specific performance<sup>3</sup>, fraud<sup>4</sup>, mistake<sup>5</sup>, accident<sup>6</sup>, account<sup>7</sup>, apportionment<sup>8</sup>, contribution<sup>9</sup>, administration of estates<sup>10</sup>, partnership<sup>11</sup>, determination of boundaries<sup>12</sup>, partition<sup>13</sup> and dower<sup>14</sup>. In tithes, and in dealing with the assets of deceased persons, the jurisdiction in equity was concurrent with that of the ecclesiastical courts.

1 As to the categorisation of equitable jurisdiction as exclusive, concurrent and auxiliary see PARA 403 the text and note 3 ante.

2 Thus, where an heir was liable to a claim against his ancestor, but had a right to be reimbursed out of the personal estate, multiplicity of suits was avoided by bringing both heir and executor before the court: *Knight v Knight* (1734) 3 P Wms 331 at 333. As to the former Court of Chancery see PARAS 401-403 ante.

3 See PARAS 410-411 post.

4 See PARA 412 et seq post.

5 See PARA 439 et seq post.

6 See PARA 445 et seq post.

7 See PARA 449 et seq post.

8 See PARAS 456-457 post.

9 See PARAS 458-459 post.

10 See PARA 460 et seq post.

11 See PARA 463 et seq post.

12 See PARA 466 post.

13 See PARA 467 post.

14 See PARA 468 post.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/A. NATURE OF THE CONCURRENT JURISDICTION/409. When equity does not interfere.

#### **409. When equity does not interfere.**

Although equity has no jurisdiction in criminal matters as such<sup>1</sup>, it may interfere so as to prevent injury arising from criminal acts, such as injury to property<sup>2</sup> or reputation<sup>3</sup>, and so as to protect minors from the consequences of such acts<sup>4</sup>. Equity may also interfere to prevent the commission of acts rendered criminal by statute where the rights of the public are involved and the remedies provided by statute are ineffective to prevent the commission of such acts<sup>5</sup>.

In cases of concurrent jurisdiction, where proceedings were pending at law, the former Court of Chancery did not interfere unless it had better means of doing justice between the parties than a court of law, either because it could give a more perfect remedy or because the nature of the case admitted of its being better tried by the procedure in equity than at law<sup>6</sup>. Where the action at law was on an instrument or judgment, and the defence was fraud, this was a question which, under the later procedure at law, could be better tried there, and the Court of Chancery, although it had complete jurisdiction in such a case, refused to interfere<sup>7</sup>. Where, however, jurisdiction in equity had once been assumed, because there was no adequate remedy at law, such jurisdiction was not lost by the common law courts obtaining an equivalent jurisdiction<sup>8</sup>.

1 *A-G v Sheffield Gas Consumers Co* (1853) 3 De GM & G 304 at 320; *Emperor of Austria v Day and Kossuth* (1861) 3 De GF & J 217 at 253; and see CIVIL PROCEDURE vol 11 (2009) PARA 343. For a time after the fusion of the administration of law and equity effected by the Supreme Court of Judicature Acts 1873 and 1875 (repealed), the judges of the Chancery Division went on circuit and tried criminal cases: see Agnes Fry, *Memoir of Sir Edward Fry* 68 et seq (he was the first Chancery judge appointed after those Acts), but this practice did not last long.

2 In *Springhead Spinning Co v Riley* (1868) LR 6 Eq 551 it was held by Malins V-C that an injunction would be granted to restrain acts by members of a trade union which were criminal on the ground that the employers' business was thereby damaged. The case was disapproved in *Prudential Assurance Co v Knott* (1875) 10 Ch App 142; but it is not clear that it was overruled on this point.

3 *Duchess of Argyll v Duke of Argyll* [1967] Ch 302, [1965] 1 All ER 611.

4 *Gee v Pritchard* (1818) 2 Swan 402 at 413.

5 *A-G v Sharp* [1931] 1 Ch 121, CA; *A-G v Premier Line Ltd* [1932] 1 Ch 303; *A-G v Smith* [1958] 2 QB 173, [1958] 2 All ER 557; *A-G v Harris* [1961] 1 QB 74, [1960] 3 All ER 207, CA; *Gouriet v Post Office Engineering Union* [1978] AC 435, [1977] 3 All ER 70, HL; *Waverley Borough Council v Hilden* [1988] 1 All ER 807, [1988] 1 WLR 246; *Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd* [1993] AC 227, [1992] 2 All ER 717, HL.

6 *Ochsenbein v Papelier* (1873) 8 Ch App 695 at 697. As to the former Court of Chancery see PARAS 401-403 ante.

7 *Ochsenbein v Papelier* (1873) 8 Ch App 695 at 697; *Hoare v Bremridge* (1872) 8 Ch App 22, CA.

8 'It does not follow, because the court of law will give relief, that this court loses the concurrent jurisdiction which it has always had': see *Atkinson v Leonard* (1791) 3 Bro CC 218 at 224 (lost bonds); *Kemp v Pryor* (1802) 7 Ves 237 (money had and received); *British Empire Shipping Co Ltd v Somes* (1857) 3 K & J 433 at 437 (bill for discovery); *Eyre v Everett* (1826) 2 Russ 381 at 382.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/B. SPECIFIC PERFORMANCE/410. Remedy of specific performance.

## **B. SPECIFIC PERFORMANCE**

### **410. Remedy of specific performance.**

Where a contract is not duly performed on one side, the normal remedy is a claim at law to recover damages for breach of contract; but, if this were the only remedy, it would always be at the option of the defaulting party either to perform his contract or to pay damages. In many cases damages are an adequate remedy and the exercise of this option does no injury to the other party; but in cases where the remedy of damages was not adequate<sup>1</sup>, equity from very early times<sup>2</sup> assumed jurisdiction to deprive the defaulting party of this option and to compel him to carry his contract into effect. The remedy of specific performance<sup>3</sup> is peculiar to equity, but it is exercised in respect of contracts, which form a subject that is equally within the cognisance of courts of common law; and the foundation of the equitable jurisdiction is that the remedy at law is inadequate<sup>4</sup>. Originally the plaintiff<sup>5</sup> was required to establish his legal title by recovering damages on the contract at law before he came into equity<sup>6</sup>; specific performance was granted as a better remedy on the legal title<sup>7</sup>, and, in strictness, it assumed that the contract could be sued on at law<sup>8</sup>. It is clear, however, that the remedy is not confined to cases where there is a cause of action at law; all that is necessary is to show circumstances which will justify intervention by a court of equity<sup>9</sup>. Hence the remedy may be available where the claimant has forfeited his legal remedy by not himself observing the contract in all respects<sup>10</sup>.

1 'The court gives specific performance instead of damages only when it can by that means do more perfect and complete justice': *Wilson v Northampton and Banbury Junction Rly Co* (1874) 9 Ch App 279 at 284 per Lord Selborne LC. See also *Flint v Brandon* (1803) 8 Ves 159; *Chinn v Collins (Inspector of Taxes)* [1979] Ch 447, [1979] 2 All ER 529, CA; *re*vsd without affecting this point [1981] AC 533, [1981] 1 All ER 189, HL.

2 Kerly, *History of Equity* 147; Fry, *Specific Performance* (6th Edn, 1921) s 33 et seq; *Select Cases in Chancery* (Selden Society vol 10) xxxv.

3 See generally SPECIFIC PERFORMANCE.

4 *Harnett v Yielding* (1805) 2 Sch & Lef 549 at 553 per Lord Redesdale LC. The question whether specific performance will be enforced does not depend on whether the subject matter of the contract is real or personal property, but on the inadequacy of the remedy at law; although usually this is inadequate in the case of realty and adequate in the case of personalty: *Adderley v Dixon* (1824) 1 Sim & St 607 at 610 per Leach V-C. For instances when specific performance will, and when it will not, be enforced see SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 805 et seq. In working out an order for specific performance, the court is not limited to the strict and precise terms of the contract: see eg *Gill v Tsang* [2003] All ER (D) 175 (Jul).

There was at one time a notion that a court of equity, if it refused specific performance, might give compensation for the breach of contract (*Denton v Stewart* (1786) 1 Cox Eq Cas 258; *Greenaway v Adams* (1806) 12 Ves 395 at 401-402), but this view was later dissented from (*Todd v Gee* (1810) 17 Ves 273; *Sainsbury v Jones* (1839) 5 My & Cr 1; and see *Aberaman Ironworks v Wickens* (1868) LR 5 Eq 485; on appeal (1868) 4 Ch App 101). There is now statutory power for a court to award damages in addition to, or in lieu of, specific performance: see the Supreme Court Act 1981 s 50; *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, HL. As to the assessment of such damages it is now settled that the same compensatory principle applies both to damages in lieu under the statutory provisions and to damages at common law: see *Wroth v Tyler* [1974] Ch 30, [1973] 1 All ER 897; *Malhotra v Choudhary* [1980] Ch 52, [1979] 1 All ER 186, CA; *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL; *Jaggard v Sawyer* [1995] 2 All ER 189, [1995] 1 WLR 269, CA; *Gafford v Graham* (1998) 77 P & CR 73, CA. See also DAMAGES vol 12(1) (Reissue) PARA 1120; SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 859.

5 A 'plaintiff' in civil proceedings is now generally known as the 'claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

6 Before Lord Somers' time the party was sent to law, and the bill for specific performance was entertained only if he was awarded damages: *Dodsley v Kinnersley* (1761) Amb 403 at 406; and see *Marquis of Normandy v Duke of Devonshire* (1697) Freem Ch 216 at 217.

7 *Halsey v Grant* (1806) 13 Ves 73 at 76; *Alley v Deschamps* (1806) 13 Ves 225 at 229.

8 *Williams v Steward* (1817) 3 Mer 472 at 491; and see *Cannel v Buckle* (1724) 2 P Wms 243 (jurisdiction to enforce an agreement to convey land in consideration of marriage affirmed).

9 *Marks v Lilley*[1959] 2 All ER 647, [1959] 1 WLR 749; *Hasham v Zenab*[1960] AC 316 at 329, [1960] 2 WLR 374 at 376-377, PC; *R v Bradford Metropolitan District Council, ex p Pickering* (2000) 33 HLR 409 at 415-417 per Munby J.

A contractual term, even if construable as purporting to oust the equitable doctrine 'he who comes to equity must come with clean hands' (see PARA 560 post), cannot fetter the court's discretion to grant or refuse specific performance after taking account of the claimant's conduct: *Quadrant Visual Communications Ltd v Hutchison Telephone (UK) Ltd*[1993] BCLC 442, [1992] 3 LS Gaz R 31, CA.

10 *Davis v Hone* (1805) 2 Sch & Lef 341 at 347; *Lennon v Napper* (1802) 2 Sch & Lef 682 at 684. Prior to the passing of the Law of Property (Miscellaneous Provisions) Act 1989, where a contract did not comply with the Law of Property Act 1925 s 40 (repealed) and was accordingly unenforceable at law, equity would grant a decree of specific performance if there had been a sufficient act of part performance: see *Steadman v Steadman*[1976] AC 536, [1974] 2 All ER 977, HL.

## UPDATE

### 410 Remedy of specific performance

NOTE 4--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/B. SPECIFIC PERFORMANCE/411. Development of jurisdiction to compel delivery of chattels.

#### **411. Development of jurisdiction to compel delivery of chattels.**

Analogous to the jurisdiction in specific performance, although not arising out of contract, was the jurisdiction to compel the specific delivery of chattels<sup>1</sup>. Such jurisdiction was exercised in cases where chattels were wrongfully withheld and the plaintiff<sup>2</sup> could not be adequately compensated by damages<sup>3</sup>. The appropriate remedy at common law was an action of detinue, but in this the defendant might either return the chattel or pay the assessed value<sup>4</sup>. Where the chattel could be replaced, the payment of the value was a compensation to the plaintiff; but, where the article was unique in its nature<sup>5</sup>, or where it was associated with rights in real estate<sup>6</sup>, damages were not an adequate compensation, and equity supplied the deficiency of the common law remedy by requiring the chattel to be returned. There was additional reason for the interference of equity where the chattel was withheld in breach of trust<sup>7</sup>.

1 As to the High Court's power to order the specific delivery of chattels see now CPR Sch 1 RSC Ord 45 rr 4, 5; for the similar power exercisable by county courts see CPR Sch 2 CCR Ord 26 r 16; and see CIVIL PROCEDURE vol 12 (2009) PARA 1248.

2 A 'plaintiff' in civil proceedings is now generally known as a 'claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

3 *Fells v Read* (1796) 3 Ves 70; and see *Lloyd v Loaring* (1802) 6 Ves 773; *Lowther v Lowther* (1806) 13 Ves 95; *IBL Ltd v Coussens* [1991] 2 All ER 133, CA.

4 This option was removed by the Common Law Procedure Act 1854 s 78 (repealed), and the defendant in the common law action could be compelled to return the chattel. Power to order delivery of chattels due under contract is given by the Sale of Goods Act 1979 s 52: see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 305.

5 *Duke of Somerset v Cookson* (1735) 3 P Wms 390; cf *Dowling v Betjemann* (1862) 2 John & H 544 (where the plaintiff had himself, in effect, placed a price on the article).

6 *Pusey v Pusey* (1684) 1 Vern 273 (the Pusey horn, a chattel held as an incident of tenure); *Jackson v Butler* (1742) 2 Atk 306 (mortgage deeds); *Earl of Macclesfield v Davis* (1814) 3 Ves & B 16.

7 *Fells v Read* (1796) 3 Ves 70.

#### **UPDATE**

#### **411 Development of jurisdiction to compel delivery of chattels**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/C. FRAUD/412. Development of jurisdiction in equity in respect of fraud.

## **C. FRAUD**

### **412. Development of jurisdiction in equity in respect of fraud.**

A court of equity has jurisdiction to relieve against every species of fraud<sup>1</sup>, including fraud in regard to wills<sup>2</sup>. The jurisdiction in equity was concurrent with the common law jurisdiction<sup>3</sup>. The appropriate court was determined by the procedure and by the nature of the remedy. As regards procedure a court of equity was originally the better court, both for the plaintiff<sup>4</sup> because he could get discovery<sup>5</sup> and relief at the same time, and for the defendant, because he could clear himself on oath<sup>6</sup>, a privilege denied to him at law until 1851<sup>7</sup>. Moreover, in equity presumption of fraud could be acted on, whereas at law strict proof would be required<sup>8</sup>.

1 *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125; *Hoare v Bremridge* (1872) 8 Ch App 22 at 26 per Lord Selborne LC; and see *Hanington v Du Chastel* (1781-83) 2 Swan 159n; *St Aubyn v Smart* (1867) LR 5 Eq 183; affd (1868) 3 Ch App 646; *Slim v Croucher* (1860) 1 De G F & J 518 at 527. Fraud, trust and accident were frequently referred to as the matters with which equity was specially conversant: *Man v Ward* (1741) 2 Atk 228 at 229; 1 Hargreave's Law Tracts 431. The court does not regard it as a fraud to take advantage of legal rights which may be taken to be known to both parties: *Re Monolithic Building Co, Tacon v Monolithic Building Co* [1915] 1 Ch 643 at 663, CA, per Lord Cozens-Hardy MR; *Midland Trust Co Ltd v Green* [1981] AC 513 at 531, [1981] 1 All ER 153 at 159, HL; *Lysus v Prowsa Developments Ltd* [1982] 2 All ER 953, [1982] 1 WLR 1044. As to fraud see further MISREPRESENTATION AND FRAUD.

2 Formerly, power was reserved to the ecclesiastical court to set aside wills of personal estate, and in the case of real estate the will might be set aside at law on the issue 'devisavit vel non', and the Court of Chancery had no authority to set aside a will of land without a trial at law: *Kerrich v Bransby* (1727) 7 Bro Parl Cas 437; *Allen v M'Pherson* (1847) 1 HL Cas 191. The jurisdiction of the former Probate, Divorce and Admiralty Division of the High Court of Justice in regard to contested wills is now exercised in the Chancery Division: see the Supreme Court Act 1981 s 61(1), Sch 1 para 1(h); para 496 post at head (8) in the text; and COURTS vol 10 (Reissue) PARA 611; EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 74.

3 *Hoare v Bremridge* (1872) 8 Ch App 22 at 26-27 per Lord Selborne LC (where the extent of the concurrence is considered and explained). For a further explanation of the relationship between fraud at common law and in equity see *Nocton v Lord Ashburton* [1914] AC 932 at 946-957, HL, per Viscount Haldane.

4 A 'plaintiff' in civil proceedings is now generally known as a 'claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

5 The modern term for 'discovery' is 'disclosure': see CIVIL PROCEDURE vol 11 (2009) PARA 538 et seq.

6 *Evans v Bicknell* (1801) 6 Ves 174 at 184.

7 See the Evidence Act 1851 s 2; and CIVIL PROCEDURE vol 11 (2009) PARA 966.

8 *Man v Ward* (1741) 2 Atk 228 at 229; *Fullagar v Clark* (1812) 18 Ves 481 at 483; and see *Trenchard v Wanley* (1723) 2 P Wms 165 at 166-167.

## **UPDATE**

### **412 Development of jurisdiction in equity in respect of fraud**

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/C. FRAUD/413. Nature of fraud.

### 413. Nature of fraud.

The court has never ventured to lay down, as a general proposition, what constitutes fraud<sup>1</sup>. Actual fraud arises from acts and circumstances of imposition<sup>2</sup>. It usually takes either the form of a statement of what is false or a suppression of what is true<sup>3</sup>. The withholding of information<sup>4</sup> is not in general fraudulent unless there is a special duty to disclose it. Thus upon a contract of sale the maxim 'let the purchaser beware'<sup>5</sup> applies both at law and in equity; and a party who has special knowledge of the property is not bound to disclose it unless there is some obligation of disclosure arising otherwise than out of the relation of vendor and purchaser<sup>6</sup>. The obligation of disclosure may arise from the relation of the parties, as where they are agent and principal; or from the nature of the contract, as where it is a contract of the utmost good faith<sup>7</sup>, such as a contract of partnership or of insurance; or in ordinary contracts from circumstances occurring during the negotiation, as where a statement made with honest belief is subsequently discovered to be false<sup>8</sup>. The partial statement of fact and the withholding of essential qualifications may make that which is stated absolutely false<sup>9</sup>.

In the case of a will, on proof of the fraud, the court<sup>10</sup> will refuse probate of the will or grant probate with the impugned part omitted, as the case may require<sup>11</sup>. Alternatively, the court will allow the will to stand and declare the fraudulent beneficiary to be a trustee for the beneficiary intended by the testator<sup>12</sup>, or enforce the condition on which the testamentary disposition has been procured and so prevent advantage from being taken of the fraud<sup>13</sup>.

1 *Mortlock v Buller* (1804) 10 Ves 292 at 306 per Lord Eldon LC; *Nocton v Lord Ashburton* [1914] AC 932, HL. 'In my opinion, fraud involves dishonesty': *Lloyds Bank Ltd v Marcan* [1973] 3 All ER 754 at 760, [1973] 1 WLR 1387 at 1392, CA, per Cairns LJ. The court did not lay down a general rule beyond which it would not go, lest other means of avoiding the equity of the court should be found out: *Lawley v Hooper* (1745) 3 Atk 278 at 279. See also *Pallant v Morgan* [1953] Ch 43, [1952] 2 All ER 951. For a fuller discussion of what is known as 'the *Pallant v Morgan* equity' see *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372, [2000] 2 All ER 117, CA.

2 *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125 at 155. This is the first kind of fraud in Lord Hardwicke's classification.

3 As to the constituent elements of a representation see MISREPRESENTATION AND FRAUD.

4 I.e. suppression of the truth (*suppressio veri*).

5 I.e. *caveat emptor*: see further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 77.

6 *Fox v Mackreth* (1788) 2 Bro CC 400 at 420; and see *Turner v Harvey* (1821) Jac 169; *Keates v Earl of Cadogan* (1851) 10 CB 591; and SALE OF LAND vol 42 (Reissue) PARA 62. The rule does not impose any limitation upon the liability of a vendor for negligence in amateur building work: *Hone v Benson* (1978) 248 Estates Gazette 1013.

7 I.e. *uberrimae fidei*.

8 *Davies v London and Provincial Marine Insurance Co* (1878) 8 ChD 469 at 474-475 per Fry J; *Brownlie v Campbell* (1880) 5 App Cas 925 at 950, HL, per Lord Blackburn; *With v O'Flanagan* [1936] Ch 575, [1936] 1 All ER 727, CA.

9 I.e. and bring it under the head of *suggestio falsi*: *Peek v Gurney* (1873) LR 6 HL 377 at 403; *Aaron's Reefs v Twiss* [1896] AC 273 at 287, HL.

10 In the Chancery Division of the High Court: see PARA 412 note 2 ante. County courts have a limited jurisdiction: see COURTS vol 10 (Reissue) PARA 710.

11 *Kerrich v Bransby* (1727) 7 Bro Parl Cas 437; *Allen v M'Pherson* (1847) 1 HL Cas 191; *Meluish v Milton* (1876) 3 ChD 27, CA. A distinction has been taken where probate has been obtained by fraud; and it has been said that in such a case equity would interfere: *Barnesly v Powel* (1748) 1 Ves Sen 119; *Barnesly v Powel* (1749) 1 Ves Sen 284; *Price v Dewhurst* (1838) 4 My & Cr 76.

12 *Allen v M'Pherson* (1847) 1 HL Cas 191; and see the judgment of Lord Lyndhurst and the cases referred to therein. Cf *Whitton v Russell* (1739) 1 Atk 448; and see *Barnesly v Powel* (1748) 1 Ves Sen 119; *Barnesly v Powel* (1749) 1 Ves Sen 284; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 67.

13 *Tharp v Tharp* [1916] 1 Ch 142 at 152.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/C. FRAUD/414. Equitable remedies.

#### 414. Equitable remedies.

In equity<sup>1</sup> the plaintiff<sup>2</sup> could not obtain damages for fraud<sup>3</sup>, but he could obtain the rescission of a contract<sup>4</sup>, or the setting aside of a deed or other instrument and the restitution of property, with any pecuniary adjustment that might be necessary on either side by way of accounting for profits or allowance for depreciation<sup>5</sup>. It seems that in some circumstances equity might award compensation for the infraction of an equitable obligation<sup>6</sup>. The former Court of Chancery was later given power to award damages in addition to or in substitution for an injunction or a decree of specific performance<sup>7</sup>. Further damages may now be recovered in lieu of rescission for non-fraudulent misrepresentation<sup>8</sup>.

A misrepresentation made without knowledge of its untruth is a ground in equity for rescinding a contract<sup>9</sup>. Any misrepresentation which in fact induces a person to enter into a contract entitles him to rescind; the question whether or not it would have induced a reasonable person to enter into the contract relates only to the onus of proof<sup>10</sup>. If a misrepresentation was fraudulent, the fact that the contract has been completed does not destroy the right of rescission. Rescission may be allowed for innocent misrepresentation where the misrepresentation has become a term of the contract or the contract has been performed, or both, in the same way as where the misrepresentation is fraudulent<sup>11</sup>. An innocent misrepresentation also affords a ground in equity for restitution of property in certain circumstances and a donor, for example, has a right in equity, though he may have none at law, to have a gift obtained by means of innocent misrepresentation restored to him by the donee<sup>12</sup>. Restitution of property can also be obtained from the holder of it, even though he was no party to its being acquired by fraud<sup>13</sup>. In certain circumstances documents will be ordered to be delivered up to be cancelled<sup>14</sup>. A person who takes possession of land under an expectation, created or encouraged by the owner, that he will have an interest in it, and, with the owner's knowledge and without objection by him, expends money on the land, will be protected, the doctrine of acquiescence operating as an estoppel being founded on fraud<sup>15</sup>.

In equity misrepresentation is akin to and really a form of undue influence or unconscionable behaviour. It is not necessary to prove manifest disadvantage<sup>16</sup>.

1 One view is that the former Court of Chancery in fact had the power, but from a very early time considered it to be ordinarily undesirable to exercise it: see PM McDermott *Equitable Damages* (1994). As to the former Court of Chancery see PARAS 401-403 ante.

2 A 'plaintiff' in civil proceedings is now generally known as a 'claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

3 Damages were the plaintiff's remedy in a common law action of deceit. There is no such thing as an equitable action of deceit: *Arkwright v Newbold* (1881) 17 ChD 301, CA; *Smith v Chadwick* (1884) 9 App Cas 187, HL; *Derry v Peek* (1889) 14 App Cas 337, HL. Although the plaintiff could not be awarded damages, he could in equity obtain an indemnity or replacement of a fund but not compensation which amounted to damages: *Whittington v Seale-Hayne* (1900) 82 LT 49; *Nocton v Lord Ashburton* [1914] AC 932, HL. Extrajudicially Lord Millett has said that 'damages for breach of trust' (or fiduciary duty) is a misleading expression the use of which should be stamped out: see PJ Millett 'Equity's Place in the Law of Commerce' (1998) 114 LQR 214 at 225. Note, however, that the remedy of damages is available in cases of breach of confidence 'despite the equitable nature of the wrong, through a beneficent interpretation of Lord Cairns' Act' [Chancery Amendment Act 1858]: *A-G v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 286, [1988] 3 All ER 545 at 662, HL, per Lord Goff of Chieveley. See also *Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923, CA.



4 As to rescission see MISREPRESENTATION AND FRAUD.

5 *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 at 1278, HL, applied in *Cheese v Thomas* [1994] 1 All ER 35, [1994] 1 WLR 129, CA. Note *Phelps v Prothero* (1855) 7 De GM & G 722, cited by Lord Edmund-Davies in *Raineri v Miles* [1981] AC 1050 at 1081, [1980] 2 All ER 145 at 154, HL, where Turner LJ said: 'it is the constant course of this court, in cases between vendor and purchaser ... to direct an inquiry as to the deterioration of the estate pending the contract, and in doing so the court is in truth giving damages to the purchaser for the loss which he has sustained by the contract not having been literally performed'. In appropriate cases an account of profits may be made as incidental to an injunction: see *A-G v Blake (Jonathan Cape Ltd third party)* [2001] 1 AC 268 at 279, [2000] 4 All ER 385 at 392, HL, per Lord Nicholls of Birkenhead.

6 *Nocton v Lord Ashburton* [1914] AC 932; *United States Surgical Corp v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766 at 816, NSW SC, per McLelland J; *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, [1985] 3 All ER 351, CA; *Day v Mead* [1987] 2 NZLR 443 at 450, NZ CA, per Robin Cooke P; *Mahoney v Purnell* [1996] 3 All ER 61, [1997] 1 FLR 612; *Swindle v Harrison* [1997] 4 All ER 705, [1997] PNLR 641, CA. In *Tang Man Sit (personal representatives) v Capacious Investments Ltd* [1996] AC 514 at 520, [1996] 1 All ER 193 at 196, PC, Lord Nicholls of Birkenhead, delivering the advice of the Board, described compensation as 'a monetary remedy awarded by the Court of Chancery for breach of equitable obligations'.

7 See under Lord Cairns' Act (Chancery Amendment Act 1858) s 2.

8 See the Misrepresentation Act 1967 s 2; *Government of Zanzibar v British Aerospace (Lancaster House) Ltd* [2000] 1 WLR 2333, (2000) Times, 28 March; and MISREPRESENTATION AND FRAUD. See also *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573, 12 Tr LR 145.

9 *Rawlins v Wickham* (1858) 3 De G & J 304, CA; *Redgrave v Hurd* (1881) 20 ChD 1, CA; *Walker v Boyle, Boyle v Walker* [1982] 1 All ER 634, [1982] 1 WLR 495.

10 *Museprime Properties Ltd v Adhill Properties Ltd* [1990] 2 EGLR 196.

11 See the Misrepresentation Act 1967 s 1; and MISREPRESENTATION AND FRAUD. Before the Misrepresentation Act 1967, however, there could be no rescission after completion of a contract for the sale of land (*Early v Garrett* (1829) 9 B & C 928; *Wilde v Gibson* (1848) 1 HL Cas 605) or probably after the execution of a formal lease (*Angel v Jay* [1911] 1 KB 666, DC; *Edler v Auerbach* [1950] 1 KB 359, [1949] 2 All ER 692). The rule was less firmly established in other cases: see *Seddon v North Eastern Salt Co Ltd* [1905] 1 Ch 326; cf *Leaf v International Galleries* [1950] 2 KB 86, [1950] 1 All ER 693, CA; *Long v Lloyd* [1958] 2 All ER 402, [1958] 1 WLR 753, CA.

12 *Re Glubb, Bamfield v Rogers* [1900] 1 Ch 354, CA; not following *Wilson v Thornbury* (1875) 10 Ch App 239 in this respect; and see GIFTS vol 52 (2009) PARA 261.

13 *Bridgeman v Green* (1757) Wilm 58.

14 See PARAS 485-486 post.

15 See PARA 909 post; and ESTOPPEL vol 16(2) (Reissue) PARA 1091 et seq.

16 *Bank of Cyprus (London) Ltd v Markou* [1999] 2 All ER 707, 78 P & CR 208. See PARA 420 post.

## UPDATE

### 414 Equitable remedies

NOTE 6--See *Yeshiva Properties No 1 Pty Ltd v Marshall* [2005] NSWCA 577.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/C. FRAUD/415. Passing off goods.

#### **415. Passing off goods.**

The jurisdiction of a court of equity to prevent a person from selling his goods under such a description as to lead members of the public to believe that they are buying the goods of another appears to have been based upon the jurisdiction to prevent fraud<sup>1</sup>. The true principle in claims for passing off is, however, that no one has any right to represent his goods as the goods of someone else; the other person has a right of property in his business or goodwill which he is entitled to have protected against injury by misrepresentation<sup>2</sup>.

<sup>1</sup> See *Pasley v Freeman* (1789) 3 Term Rep 51; *Sykes v Sykes* (1824) 3 B & C 541; *Reckitt & Colman Products Inc v Borden Inc* [1990] 1 All ER 873, HL; and TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 305.

<sup>2</sup> See *Leather Cloth Co v American Leather Cloth Co* (1865) 11 HL Cas 523 at 538 per Lord Kingsdown; *Frank Reddaway & Co Ltd v George Banham & Co Ltd* [1896] AC 199 at 209, 215, HL, per Lord Herschell; *Spalding & Bros v AW Gamage Ltd* (1915) 32 RPC 273 at 284, HL, per Lord Parker of Waddington; *Bollinger v Costa Brava Wine Co Ltd* [1960] Ch 262 at 276, [1959] 3 All ER 800 at 806; *HP Bulmer Ltd and Showerings Ltd v J Bollinger SA and Champagne Lanson Père et Fils* [1978] RPC 79, CA; *Erven Warnink BV v J Townend & Sons (Hull) Ltd* [1979] AC 731, [1979] 2 All ER 927, HL; and see TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 304 et seq.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/D. EXTENSIONS OF FRAUD/416. Constructive fraud.

## **D. EXTENSIONS OF FRAUD**

### **416. Constructive fraud.**

In cases of actual fraud<sup>1</sup> the jurisdiction in equity was strictly concurrent with that at law; but equity extended its jurisdiction by including under the head of fraud transactions which were so opposed to fair dealing between the parties that they ought not to be held binding<sup>2</sup>. Constructive fraud, as this was called, has traditionally been considered under its more common manifestations of:

- 7 (1) undue influence<sup>3</sup>;
- 8 (2) abuse of confidence<sup>4</sup>;
- 9 (3) unconscionable bargains<sup>5</sup>, including bargains with expectant heirs<sup>6</sup>, and certain transactions infringing the rights of third parties<sup>7</sup>; and
- 10 (4) frauds on a power<sup>8</sup>.

'Fraud' in its equitable context does not mean, or is not confined to, deceit; it means an unconscientious use of the power arising out of the circumstances and conditions of the contracting parties. It is victimisation, which can consist either of the active extortion of a benefit or of the passive acceptance of a benefit in unconscionable circumstances<sup>9</sup>.

The general principle is that, if a party is in a situation in which he is not a free agent and is not equal to protecting himself, a court of equity will protect him<sup>10</sup>. In all these cases there might also be circumstances of contrivance or undue advantage implying actual fraud.

1 See further MISREPRESENTATION AND FRAUD. Note that for the purposes of the Insolvency Act 1986 s 281(3), 'fraud' means actual fraud and does not include constructive fraud, such as undue influence: *Mander v Evans*[2001] 3 All ER 811, [2001] 1 WLR 2378. See further BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 643.

2 In Chancery the term 'fraud' came to be used to describe what fell short of deceit, but imported breach of a duty to which equity had attached its sanction: *Nocton v Lord Ashburton*[1914] AC 932 at 953, HL, per Lord Haldane LC. See also *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125; *Earl of Aylesford v Morris*(1873) 8 Ch App 484 at 490-491 per Lord Selborne LC; *Frank Reddaway and Frank Reddaway & Co Ltd v George Banham and George Banham & Co Ltd*[1896] AC 199 at 221 per Lord Macnaghten.

3 See PARA 417 et seq post.

4 See PARA 428 post.

5 See PARA 429 post.

6 See PARA 431 post.

7 See PARA 437 post.

8 As to frauds on powers see *Aleyn v Belchier* (1758) 1 Eden 132; 2 White & Tud LC (9th Edn) 263; *Cloutte v Storey*[1911] 1 Ch 18, CA; and POWERS vol 36(2) (Reissue) PARA 364 et seq.

9 *Hart v O'Connor*[1985] AC 1000 at 1024, [1985] 2 All ER 880 at 891-892, PC, per Lord Brightman.

10     *Evans v Llewellyn* (1787) 2 Bro CC 150.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/D. EXTENSIONS OF FRAUD/417. Undue influence; in general.

#### 417. Undue influence; in general.

A party to a transaction, though consenting to it, may not give a free consent because he is exposed to such influence from the other party as to deprive him of the free use of his judgment. In such a case equity will set the transaction aside<sup>1</sup>, and, if property has passed, will order restitution, and, if necessary, follow the property into the hands of innocent third parties<sup>2</sup>. In appropriate cases there may also be an account of profits or an award of fair compensation where the taking of an account would not do practical justice between the parties<sup>3</sup>. The doctrine of undue influence is capable of extending to a situation where the wrongdoer, for his own reasons, wanted the complainant to deal with a third party<sup>4</sup>.

Although the wisdom of the practice of making a classification of cases of undue influence has been questioned<sup>5</sup>, a distinction should still be drawn between actual undue influence and presumed undue influence<sup>6</sup>.

1 As to the imposition of conditions see *Dunbar Bank plc v Nadeem* [1998] 3 All ER 876, [1998] 3 FCR 629, CA.

2 The leading cases are *Barclays Bank v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL; *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL; *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449. Subsequent cases include *National Westminster Bank plc v Amin* [2002] UKHL 9, [2002] 1 FLR 735, [2002] All ER (D) 388 (Feb); *Governor and Co of the Bank of Scotland v Hill* [2002] EWCA Civ 1081, [2003] 1 P & CR D12, [2002] All ER (D) 184 (Jul); *UCB Corporate Services Ltd v Williams* [2002] EWCA Civ 555, [2003] 1 P & CR 168, [2002] 3 FCR 413; *Glanville v Glanville* [2002] EWHC 1271 (Ch), [2002] All ER (D) 249 (Jun); *McGregor v Michael Taylor & Co* [2002] 2 Lloyd's Rep 468, Chester Mercantile Court; *Bradshaw v Hardcastle* [2002] All ER (D) 219 (Nov); *Bradley v Halsall* [2003] All ER (D) 303 (Apr); *Pesticcio v Huet* [2003] All ER (D) 237 (Apr); *Bank of Ireland v Bongard* [2003] EWHC 612 (QB), [2003] All ER (D) 413 (Feb); *Nel (suing as executrix of Nel) v Kean* [2003] EWHC 190 (QB), [2003] All ER (D) 206 (Feb). Early cases include *Bridgman v Green* (1757) Wilm 58 and *Huguenin v Baseley* (1807) 14 Ves 273. See also *Bainbrigge v Browne* (1881) 18 ChD 188; *Allcard v Skinner* (1887) 36 ChD 145, CA; *Morley v Loughnan* [1893] 1 Ch 736; *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127, PC; *National Westminster Bank plc v Morgan* [1985] AC 686, [1985] 1 All ER 821, HL; *Goldsworthy v Brickell* [1987] Ch 378, [1987] 1 All ER 853, CA; *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 969, [1992] 4 All ER 955 at 977, CA, per Slade LJ giving the judgment of the court ('... the essence of the law of undue influence is to provide a remedy in cases in which, by the exercise of influence, proved by evidence or presumed, unfair advantage has been taken by another') (*Bank of Credit and Commerce International SA v Aboody* supra was overruled, without affecting this dictum, by *CIBC Mortgages plc v Pitt* supra); *Investors Compensation Scheme Ltd v West Bromwich Building Society (No 2)* [1999] Lloyd's Rep PN 496. As to the possibility of severing from an instrument affected by undue influence the objectionable part leaving the part uncontaminated by undue influence enforceable see *Barclays Bank v Caplan* (1997) 78 P & CR 153, [1998] 1 FLR 532; and see MISREPRESENTATION AND FRAUD. As to whether an appellate court is entitled to reverse a finding of fact by a judge at first instance that a transaction between husband and wife was at arm's length and that the wife's consent had not been obtained by undue influence see *Dailey v Dailey* [2003] UKPC 65, [2003] All ER (D) 48 (Oct).

3 *Mahoney v Purnell* [1996] 3 All ER 61, [1997] 1 FLR 612.

4 *Naidoo v Naidu* (2000) Times, 1 November.

5 See *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449 esp at [92] per Lord Clyde, at [107] per Lord Hobhouse and at [158], [161] per Lord Scott. The classification in *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, CA, adopted by Lord Browne-Wilkinson in *Barclays Bank v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL, was into: (1) Class 1, cases of actual undue influence; (2) Class 2A, cases of presumed undue influence where the law presumes the legal relationship between the parties to be one of trust and confidence; and (3) Class 2B where the claimant

must establish by affirmative evidence that he or she was accustomed to repose trust and confidence in the alleged wrongdoer.

6 As to actual and presumed undue influence see PARAS 418-419 post. Cf however *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [92], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Clyde ('on the face of it a division into cases of "actual" and "presumed" undue influence appears illogical').

## **UPDATE**

### **417 Undue influence; in general**

NOTE 5--See *Turkey v Awadh* [2005] EWCA Civ 382, [2005] 2 FCR 7.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/D. EXTENSIONS OF FRAUD/418. Actual undue influence.

#### **418. Actual undue influence.**

Actual undue influence is an equitable wrong committed by the dominant party against the other which makes it unconscionable for the dominant party to enforce his legal rights against the other. It is typically some express conduct overbearing the other party's will. It is capable of including conduct which might give rise to a defence at law, for example duress and misrepresentation. Actual undue influence does not depend upon a pre-existing relationship between the two parties though it is most commonly associated with and derived from such a relationship. The party who alleges actual undue influence must prove affirmatively that he entered into the impugned transaction not of his own will but as a result of actual undue influence exerted against him<sup>1</sup>. He must show that the other party to the transaction, or someone who induced the transaction for his own benefit, had the capacity to influence the complainant; that the influence was exercised; that its exercise was undue; and that its exercise brought about the transaction<sup>2</sup>. It is not necessary, however, to show domination<sup>3</sup>. Whether actual undue influence has been exercised is a question of fact<sup>4</sup>.

1 See *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [103], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Hobhouse; cf *Barclays Bank v O'Brien* [1994] 1 AC 180 at 189, [1993] 4 All ER 417 at 423, HL, per Lord Browne-Wilkinson. See also *Coldunell Ltd v Gallon* [1986] QB 1184, [1986] 1 All ER 429, CA; *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, CA (overruled on other grounds by *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL); *Wright v Cherrytree Finance Ltd (Scott and anor Pt 20 defendants)* [2001] EWCA Civ 449, [2001] 2 All ER (Comm) 877, 82 P & CR D20.

2 *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 967, [1992] 4 All ER 955 at 976, CA, per Slade LJ (overruled on other grounds by *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL).

3 *Tufts v Sperry* [1952] 2 TLR 516, CA; *Goldsworthy v Brickell* [1987] Ch 378, [1987] 1 All ER 853, CA. Cf *Wigan Borough Council v Green & Son (Wigan) Ltd* [1985] 2 EGLR 242, CA.

4 *Langton v Langton* [1995] 3 FCR 521, [1995] 2 FLR 890; *Clarke v Prus* (8 March 1995), Lexis; *UCB Corporate Services Ltd v Williams* [2002] EWCA Civ 555, [2003] 1 P & CR 168, [2002] 3 FCR 413.

#### **UPDATE**

#### **418 Actual undue influence**

NOTE 1--See *Pesticcio v Huet* [2004] EWCA Civ 372, [2004] All ER (D) 36 (Apr) (court could set aside the transaction on account of undue influence even where the conduct of the donee had not been found to be wrongful).

NOTE 3--See *Drew v Daniel* [2005] EWCA Civ 507, [2005] 2 FCR 365 (the vulnerability of one party and the forcefulness of the other were relevant in determining whether actual undue influence had been exerted).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/D. EXTENSIONS OF FRAUD/419. Presumed undue influence.

#### **419. Presumed undue influence.**

Presumed undue influence arises out of a relationship between two persons where one person has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage<sup>1</sup>. In these cases the influence one person has over another provides scope for misuse without any specific overt acts of persuasion. The typical case is where one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests<sup>2</sup>. The principle is not confined to cases of abuse of trust and confidence; other expressions used in an endeavour to encapsulate the essence include reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other, but none of these descriptions is perfect<sup>3</sup>.

Whether a transaction was brought about by the exercise of what is commonly called 'presumed undue influence' is a question of fact and the burden of proving it rests upon the person who claims to have been wronged. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personalities of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship and all the circumstances of the case. Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. The court may then infer that the transaction was procured by undue influence. This situation is conventionally described as one in which a presumption of undue influence arises, the use of the word 'presumption' being descriptive of a shift in the evidential onus on a question of fact<sup>4</sup>.

It should be added that although legitimate commercial pressure brought by a creditor, coupled with proper feelings of family loyalty and a laudable desire to help a husband or son in financial difficulty, may be difficult to resist, it has been said that such pressure will not constitute undue influence unless the wrongdoer's importunity has left the complainant with no will of her own<sup>5</sup>.

The evidential presumption described above must be distinguished sharply from a different form of presumption which arises in some cases. The law has adopted a sternly protective attitude towards certain types of relationship in which one party acquires influence over another who is vulnerable and dependent and where, moreover, substantial gifts by the influenced or vulnerable person are not normally to be expected. In these cases the law presumes, irrebuttably, that one party had influence over the other. The complainant need not prove he actually reposed trust and confidence in the other party; it is sufficient for him to prove the existence of the type of relationship<sup>6</sup>. Well-established categories of such a relationship are those between parent and child<sup>7</sup>, guardian and ward<sup>8</sup>, trustee and beneficiary<sup>9</sup>, solicitor and client<sup>10</sup>, doctor and patient<sup>11</sup>, and religious superior and inferior<sup>12</sup>. The relationship of husband and wife does not as such give rise to the presumption<sup>13</sup>, although it seems that the presumption may apply to engaged couples<sup>14</sup>. The presumption does not arise from the normal relationship of banker and customer<sup>15</sup>, nor from that of employer and employee or of landlord and tenant or from a combination of the two<sup>16</sup>.

<sup>1</sup> In *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [8], [2002] 2 AC 773, [2001] 4 All ER 449 Lord Nicholls of Birkenhead gave as an example from the nineteenth century, when much of the law discussed



in this paragraph was developed, *Bainbrigge v Browne* (1881) 18 ChD 188 where an impoverished father prevailed upon his inexperienced children to charge their reversionary interests under their parents' marriage settlement with payment of his mortgage debts. See *Huguenin v Baseley* (1807) 14 Ves 273; *Allcard v Skinner* (1887) 36 ChD 145; *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127, PC; *Re Craig, Meneces v Middleton* [1971] Ch 95, [1970] 2 All ER 390; *National Westminster Bank plc v Morgan* [1985] AC 686, [1985] 1 All ER 821, HL; *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, [1985] 3 All ER 351, CA; *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281, CA; *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, CA (overruled on other grounds by *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL); *Simpson v Simpson* [1989] Fam Law 20. Cf *Re Brocklehurst, Hall v Roberts* [1978] Ch 14, [1978] 1 All ER 767, CA. Not every fiduciary relationship gives rise to a presumption of undue influence: *Re Coomber, Coomber v Coomber* [1911] 1 Ch 723, CA.

2 *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [9], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Nicholls of Birkenhead. See also *Allcard v Skinner* (1887) 36 ChD 145, CA; *Zamet v Hyman* [1961] 3 All ER 933, [1961] 1 WLR 1442, CA.

3 *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449. See also *Allcard v Skinner* (1887) 36 ChD 145, CA; *Re Craig, Meneces v Middleton* [1971] Ch 95, [1970] 2 All ER 390.

4 *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449. In *Hammond v Osborn* [2002] EWCA Civ 885, [2002] 2 P & CR D41, [2002] All ER (D) 232 (Jun), the presumption of undue influence was not rebutted where it was impossible to say gifts had been made after full, free and informed thought. See also *Roche v Sheerington* [1982] 2 All ER 426, [1982] 1 WLR 599.

5 *Royal Bank of Scotland v Etridge (No 2)* [1998] 4 All ER 705 at 712-713, CA, [1998] 3 FCR 675 at 684, CA, per Stuart-Smith LJ, giving the judgment of the court; affd [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449 with some criticism of the reasoning of the Court of Appeal but without, it is thought, invalidating this statement; *Goldsworthy v Brickell* [1987] Ch 378, [1987] 1 All ER 853, CA; *Langton v Langton* [1995] 3 FCR 521, [1995] 2 FLR 890.

6 *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449.

7 See PARA 425 post.

8 See PARA 426 post.

9 See note 8 supra.

10 See PARA 427 post.

11 *Mitchell v Homfray* (1881) 8 QBD 587, CA; *Re CMG* [1970] Ch 574, [1970] 2 All ER 740n (governors of private mental hospital and patient); *Public Trustee v Skoretz* [1973] 2 WWR 638 (BC) (manager of rest home and patient). Cf *Sidaway v Bethlem Royal Hospital and Maudsley Hospital Governors* [1984] QB 493, [1984] 1 All ER 1018, CA.

12 *Allcard v Skinner* (1887) 36 ChD 145, CA.

13 *Howes v Bishop* [1909] 2 KB 390, CA; *Bank of Montreal v Stuart* [1911] AC 120, PC; *National Westminster Bank plc v Morgan* [1985] AC 686, [1985] 1 All ER 821, HL; *Kingsnorth Trust Ltd v Bell* [1986] 1 All ER 423, [1986] 1 WLR 119, CA; *Midland Bank plc v Perry* (1988) 56 P & CR 202, CA; *Midland Bank plc v Shephard* [1988] 3 All ER 17, CA; *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, CA (overruled on other grounds by *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL). The presumption may be established where there are special circumstances of illness or dependency: *Simpson v Simpson* [1989] Fam Law 20.

14 *Page v Horne* (1848) 11 Beav 227; *Re Lloyds Bank Ltd, Bomze and Lederman v Bomze* [1931] 1 Ch 289; *Zamet v Hyman* [1961] 3 All ER 933, [1961] 1 WLR 1442, CA; cf *Re Craig, Meneces v Middleton* [1971] Ch 95, [1970] 2 All ER 390; *Halifax Building Society v Brown* [1995] 3 FCR 110, [1996] 1 FLR 103, CA.

15 *Lloyds Bank Ltd v Bundy* [1975] QB 326, [1974] 3 All ER 757, CA; *National Westminster Bank plc v Morgan* [1985] AC 686, [1985] 1 All ER 821, HL; *Cornish v Midland Bank plc (Humes, third party)* [1985] 3 All ER 513, CA; *Goldsworthy v Brickell* [1987] Ch 378, [1987] 1 All ER 853, CA; *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, CA (overruled on other grounds by *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL).

16 *Matthew v Bobbins* (1980) 41 P & CR 1, CA.

## UPDATE

#### **419 Presumed undue influence**

NOTE 1--See *Pesticcio v Huet* [2004] EWCA Civ 372, [2004] All ER (D) 36 (Apr) (court could set aside the transaction on account of undue influence even where the conduct of the donee had not been found to be wrongful). See also *Stevens v Leeder* [2005] All ER (D) 40 (Jan), CA; *Markham v Karsten* [2007] EWHC 1509 (Ch), [2007] BPIR 1109 (petitioner presenting bankruptcy petitioner previously in both solicitor and client relationship and domestic relationship with respondent).

NOTE 4--See *Goodchild v Bradbury* [2006] EWCA Civ 1868, [2007] WTLR 463 (witness statement that a person has not been subject to undue influence not sufficient to rebut presumption).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/D. EXTENSIONS OF FRAUD/420. Transaction not readily explicable.

#### **420. Transaction not readily explicable.**

A claimant who proves actual undue influence is not under any further burden as to the quality of the transaction; he is entitled as of right to have it set aside<sup>1</sup>.

It was formerly said that a party relying on presumed undue influence must show that the transaction in question was 'manifestly disadvantageous' to him<sup>2</sup>; but it has recently been said that this label should be discarded as giving rise to ambiguity<sup>3</sup>. The true position is that in these cases if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity or other ordinary motives on which ordinary persons act, the burden is on the donee to support the gift<sup>4</sup>. There must be evidence that the transaction itself was wrongful in that it constituted an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it<sup>5</sup>.

1 *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL; *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449. It is thought that in the latter case at [12] Lord Nicholls' dicta should be restricted to actual undue influence; otherwise para [21] et seq would appear to be unnecessary.

2 *Allcard v Skinner* (1887) 36 ChD 145, CA; *National Westminster Bank plc v Morgan* [1985] AC 686, [1985] 1 All ER 821, HL; *Midland Bank plc v Phillips* (1986) Times, 28 March, CA; *Coldunell Ltd v Gallon* [1986] QB 1184, [1986] 1 All ER 429, CA; *Goldsworthy v Brickell* [1987] Ch 378, [1987] 1 All ER 853, CA; *Midland Bank plc v Shephard* [1988] 3 All ER 17, CA; *Midland Bank plc v Johns* [1987] CA Transcript 824; *Bank of Baroda v Shah* [1988] 3 All ER 24, CA; *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, CA (overruled by *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL); *Mahoney v Purnell* [1996] 3 All ER 61, [1997] 1 FLR 612. However, 'courts of equity have never set aside gifts on the ground of the folly, imprudence or want of foresight on the part of donors': *Allcard v Skinner* supra at 182-183 per Lindley LJ.

3 See *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [26], [29], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Nicholls of Birkenhead.

4 See *Allcard v Skinner* (1887) 36 ChD 145 at 185, CA, per Lindley LJ.

5 See *National Westminster Bank plc v Morgan* [1985] AC 686 at 704, [1985] 1 All ER 821 at 827, HL, per Lord Scarman; *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [22], [25], [29], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Nicholls of Birkenhead; but cf at [155] per Lord Scott, criticising Lord Scarman's dictum in *National Westminster Bank plc v Morgan* supra ('... the reasoning seems to me to be circular. The transaction will not be "wrongful" unless it was procured by undue influence. Its "wrongful" character is a conclusion, not a tool by which to detect the presence of undue influence.'). On this analysis it seems that the words 'was wrongful in that it' would be better omitted from Lord Scarman's dictum set out in the text to this note.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/D. EXTENSIONS OF FRAUD/421. Rebutting the presumption.

## **421. Rebutting the presumption.**

The presumption of undue influence is a rebuttable evidential presumption which shifts the burden of proof to the alleged wrongdoer. The presumption cannot be rebutted merely by evidence that the complainant understood what he or she was doing and intended to do it, but only by showing that he or she was either free from the influence of the alleged wrongdoer or had been placed by the receipt of independent advice in an equivalent position. The problem is not lack of understanding but lack of independence. Where the presumption arises a voluntary gift will be set aside unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him or her to exercise an independent will and which justify the court in holding that the gift was the result of a free exercise of the donor's will. Any sign of reluctance on the donor's part may indicate that improper pressure was being brought to bear<sup>1</sup>.

The position is different in the case of a commercial transaction. Reluctance to enter into, for example, a contract of guarantee or collateral security is not necessarily indicative that any improper pressure was being brought to bear; indeed reluctance on the part of the surety may rather show that he knew what he was doing and did it because he thought it was the right thing to do<sup>2</sup>.

1 *Huguenin v Baseley* (1807) 14 Ves 273; *Allcard v Skinner* (1887) 36 ChD 145, CA; *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127, PC; *Zamet v Hyman* [1961] 3 All ER 933, [1961] 1 WLR 1442, CA; *Goldsworthy v Brickell* [1987] Ch 378, [1987] 1 All ER 853, CA; *Banco Exterior Internacional v Mann* [1995] 1 All ER 936, [1995] 2 FCR 282, CA; *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, 74 P & CR 384, CA; *Mahoney v Purnell* [1996] 3 All ER 61, [1997] 1 FLR 612; *Royal Bank of Scotland v Etridge (No 2)* [1998] 4 All ER 705 at 714-715, CA, [1998] 3 FCR 675 at 685-686 (paras 16-18), CA, per Stuart-Smith LJ, giving the judgment of the court; affd [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449 without the passages cited being affected by criticisms of part of the Court of Appeal reasoning.

2 *Royal Bank of Scotland v Etridge (No 2)* [1998] 4 All ER 705 at 715, CA, [1998] 3 FCR 675 at 686 (para 18), CA, per Stuart-Smith LJ, giving the judgment of the court; affd [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449 without the passage cited being affected by criticisms of part of the Court of Appeal reasoning. For a case on the rebuttal of the presumption where the parties were close friends see *Banco Exterior Internacional SA v Thomas* [1997] 1 All ER 46, [1997] 1 WLR 221, CA. As to the burden of proof of undue influence see also *Barclays Bank plc v Boulter* [1999] 4 All ER 513, [1999] 1 WLR 191, HL.

## **UPDATE**

### **421 Rebutting the presumption**

NOTE 1--See *Vale v Armstrong* [2004] EWHC 1160 (Ch), [2004] 24 EG 148 (CS) (neither receipt of independent legal advice nor fact that claimant suggested transaction rebutted presumption).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/D. EXTENSIONS OF FRAUD/422. Independent advice.

## **422. Independent advice.**

Proof that the complainant received advice from an independent<sup>1</sup> third party before entering into the impugned transaction may be very helpful in rebutting the presumption of undue influence. However such advice, including legal advice, is on the one hand not always necessary nor on the other hand always sufficient<sup>2</sup>. The weight, or importance, to be attached to such advice depends on all the circumstances. Generally advice from a solicitor or other outside adviser can be expected to bring home to a complainant a proper understanding of what he or she is about to do; but a person may fully understand the implications of a proposed transaction and yet still be acting under the undue influence of another. The question is not whether the complainant knew what he was doing and intended to do, but how the intention to act was created. Whether it will be proper to infer that outside advice had an emancipating effect, so that the transaction was not brought about by the exercise of undue influence, is a question of fact to be decided having regard to all the evidence in the case<sup>3</sup>. A bank cannot avoid being fixed with constructive notice of the complainant's equity merely by relying on an honest belief that the complainant was represented in the transaction by a solicitor, since it cannot be assumed that the solicitor's retainer extended to explaining to his client the nature and effect of the transaction<sup>4</sup>.

1 If the third party is being retained by the bank, the bank cannot rely on inaccurate information supplied to it by the third party: *National Westminster Bank plc v Amin* [2002] UKHL 9, [2002] 1 FLR 735, [2002] All ER (D) 388 (Feb).

2 *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, 74 P & CR 384, CA, but note the criticism of one point in this decision in *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [58]-[61], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Nicholls of Birkenhead; *Claughton v Price* (1997) 30 HLR 396, [1997] EGCS 51, CA.

3 *Steeple v Lea* (1997) 76 P & CR 157, [1998] 2 FCR 144, CA; *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, 74 P & CR 384, CA; *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [20], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Nicholls of Birkenhead. See also *Massey v Midland Bank plc* [1995] 1 All ER 929, [1995] 1 FCR 380, CA.

4 *UCB Corporate Services Ltd v Williams* [2002] EWCA Civ 555, [2003] 1 P & CR 168, [2002] 3 FCR 413.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/D. EXTENSIONS OF FRAUD/423. The complainant and third parties; suretyship transactions.

#### **423. The complainant and third parties; suretyship transactions.**

Questions have typically arisen where a husband has borrowed money for his business from a bank secured by a mortgage on the jointly owned matrimonial home, and where, on the bank seeking to realise its security, the wife has claimed that she is not bound by her guarantee, having entered into the mortgage because of the undue influence of her husband. The principle<sup>1</sup> that has recently emerged is that in such circumstances the bank is 'put on inquiry'<sup>2</sup> and will be subject to the wife's claim unless it can establish that it has taken reasonable steps to bring home to her, as guarantor, in a meaningful way the practical implications of the proposed transaction and the risks she is running by standing as surety<sup>3</sup>. The duty to take these steps, it has been held, is not restricted to the husband/wife relationship but applies in all cases where the relationship between the surety and the debtor is non-commercial<sup>4</sup>.

In these cases a bank is put on inquiry whenever a wife offers to stand surety for her husband's debts<sup>5</sup>. Where, however, the money is being advanced to husband and wife jointly, a bank is not put on inquiry unless it is aware that the loan is being made for the husband's purposes as distinct from the couple's joint purposes<sup>6</sup>.

1 At one time the rules were often thought to be based on agency, but this theory has been discredited: *Barclays Bank v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL. Agency was established in *Turnbull & Co v Duval* [1902] AC 429, PC; *Chaplin & Co Ltd v Brammall* [1908] 1 KB 233, CA; *Kingsnorth Trust Ltd v Bell* [1986] 1 All ER 423, [1986] 1 WLR 119, CA; *Barclays Bank plc v Kennedy* (1988) 58 P & CR 221, [1989] 1 FLR 356, CA; but not in *Coldunell Ltd v Gallon* [1986] QB 1184, [1986] 1 All ER 429, CA; *Midland Bank plc v Shephard* [1988] 3 All ER 17, [1987] 2 FLR 175, CA; *Bank of Baroda v Shah* [1988] 3 All ER 24, [1988] NLJR 98, CA; *Lloyds Bank plc v Egremont* [1990] FCR 770, [1990] 2 FLR 351, CA.

2 'le put on inquiry as to whether the wife understood the nature and effect of the transaction she was entering into: see *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [147], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Scott; cf at [44] where Lord Nicholls of Birkenhead observed that the phrase 'put on inquiry' is strictly a misnomer, for the bank is not required to make any inquiries.

3 *Barclays Bank v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL; *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL; *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449.

4 *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [87], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Nicholls of Birkenhead. See *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281, 123 Sol Jo 705, CA (son and elderly parents); *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, 74 P & CR 384, CA (employer and employee); *Greene King plc v Stanley* [2001] EWCA Civ 1966, [2002] BPIR 491, [2002] All ER (D) 56 (Jan); *National Westminster Bank plc v Amin* [2002] UKHL 9, [2002] 1 FLR 735, [2002] All ER (D) 388 (Feb) (English-speaking son and non-English speaking parents). See also *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127, PC.

5 *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [44], [48], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Nicholls of Birkenhead. Likewise where a husband stands surety for his wife's debts; and similarly in the case of unmarried couples, whether heterosexual or homosexual, where the bank is aware of the relationship. Cohabitation is not essential: *Royal Bank of Scotland v Etridge (No 2)* supra at [47].

6 *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL; *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [48], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Nicholls of Birkenhead. The position is less clear cut where the wife becomes surety for the debts of a company whose shares are held by her and her husband: *Royal Bank of Scotland v Etridge (No 2)* supra at [49].



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/D. EXTENSIONS OF FRAUD/424. Steps to be taken by the lender in suretyship transactions.

#### **424. Steps to be taken by the lender in suretyship transactions.**

A bank may satisfy the requirements set out in the previous paragraph if it insists that the wife<sup>1</sup> attend a private meeting with a representative of the bank at which she is told of the extent of her liabilities as surety, warned of the risks she is running and urged to take independent advice. Alternatively the bank may seek protection by seeing to it that the wife is advised independently by a solicitor. To this end the bank should communicate directly with the wife, informing her that for its own protection it will require written confirmation from a solicitor, acting for her, to the effect that the solicitor has fully explained to her the nature of the documents and the practical implications they will have for her. She should be told that the purpose of this requirement is that thereafter she should not be able to dispute she is legally bound by the documents once she has signed them. She should be asked to nominate a solicitor<sup>2</sup> whom she is willing to instruct to advise her separately from her husband and to act for her in giving the necessary confirmation to the bank. The bank should not proceed with the transaction until it has received an appropriate response directly from the wife<sup>3</sup>.

The bank must supply the solicitor with all the necessary financial information after obtaining the husband's consent to the passing on of confidential information. Of course if consent is not forthcoming the transaction will not be able to proceed. If the solicitor cannot obtain from the bank all the information he needs, he should refuse to provide the confirmation sought by the bank. Having explained the position to the wife, setting out the risks involved, the solicitor should make it clear to the wife that she has a choice. The decision whether or not to proceed is hers and hers alone<sup>4</sup>.

Exceptionally there may be a case where the bank believes or suspects that the wife has been misled by her husband or is not entering into the transaction of her own free will. In such a case the bank must inform the wife's solicitors of the facts giving rise to its belief or suspicion<sup>5</sup>.

In every case the bank should obtain from the wife's solicitor an appropriate written confirmation of the matters referred to above<sup>6</sup>.

1   le or other guarantor.

2   The solicitor may be the same solicitor who is acting for the husband in the transaction, provided the solicitor is satisfied that this is in the wife's best interests and satisfied also that this will not give rise to any conflicts of duty or interest: *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [69]-[74], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Nicholls of Birkenhead.

3   *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449.

4   *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449. Dicta in the court below ([1998] 4 All ER 705 at 715, CA, [1998] 3 FCR 675 at 686 (para 19), CA, per Stuart-Smith LJ, giving the judgment of the court) and in *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, 74 P & CR 384, CA in effect giving the solicitor a power of veto were disapproved in *Royal Bank of Scotland v Etridge (No 2)* supra at [59]-[61] per Lord Nicholls of Birkenhead. Any deficiencies in the advice given by the solicitor to the wife are a matter between the wife and the solicitor and do not affect the bank: *Royal Bank of Scotland v Etridge (No 2)* supra at [78] per Lord Nicholls of Birkenhead.

5   *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449, esp at [79] per Lord Nicholls of Birkenhead.



6     *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [79], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Nicholls of Birkenhead.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/D. EXTENSIONS OF FRAUD/425. Parent and child.

## 425. Parent and child.

The presumption of undue influence arises in the relation of parent and child<sup>1</sup>, especially where the child has only recently come of age and is still under parental control<sup>2</sup>. The child is presumed to be under the exercise of parental influence as long as the dominion of the parent lasts<sup>3</sup>. If, however, the exercise of parental influence is disproved by any means which show that the gift was in fact the spontaneous act of the donor, acting in circumstances which enabled him to exercise an independent judgment, and which justify the court's holding that the gift was the result of a free exercise of his will<sup>4</sup>, then the gift stands on the same footing as any other gift<sup>5</sup>. It is desirable, although not essential, that a child should have independent, and if possible professional, advice before making a gift<sup>6</sup>. The rule applies where a person who is or has been in loco parentis takes a benefit from the child<sup>7</sup>.

1 *Hoghton v Hoghton* (1852) 15 Beav 278; and see EXECUTORS AND ADMINISTRATORS vol 17(1) (Reissue) PARA 323; GIFTS vol 52 (2009) PARA 259; MISREPRESENTATION AND FRAUD; SETTLEMENTS.

2 *Archer v Hudson* (1844) 7 Beav 551; *Powell v Powell* [1900] 1 Ch 243 at 246. There is no reverse presumption that a parent may be unduly influenced by an adult child (see eg *Mortgage Agency Services Number Two Ltd v Chater* [2003] EWCA Civ 490, [2003] NPC 48, [2003] All ER (D) 56 (Apr)); but this may be a factor in establishing the necessary trust and confidence (see eg *Love v Love* (11 March 1999), Lexis, CA; *Meredith v Lackschewitz-Martin* [2002] EWHC 1462 (Ch), [2002] All ER (D) 20 (Jun)). As to the elderly (whether or not there is a parent/child relationship) and undue influence see (2003) 23 LS 251 (Fiona R Burns).

3 *Wright v Vanderplank* (1856) 8 De GM & G 133 at 146 per Turner LJ.

4 *Allcard v Skinner* (1887) 36 ChD 145 at 171, CA, per Cotton LJ; *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 at 133, PC, per Lord Hailsham LC; *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co* [1964] Ch 303 at 333, [1963] 3 All ER 1 at 10, CA.

5 *Wright v Vanderplank* (1856) 8 De GM & G 133.

6 *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co* [1964] Ch 303, [1963] 3 All ER 1, CA.

7 *Archer v Hudson* (1844) 7 Beav 551.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/D. EXTENSIONS OF FRAUD/426. Guardian and ward; trustee and beneficiary.

#### **426. Guardian and ward; trustee and beneficiary.**

In the relations of guardian and ward<sup>1</sup> and trustee and beneficiary<sup>2</sup> the rule is similar to that in the case of parent and child<sup>3</sup>, but is applied more strictly. On grounds of public policy the court raises a strong presumption of undue influence, even though there is no actual unfairness<sup>4</sup>. The rule applies both during the actual relation and afterwards as long as the influence resulting from the relation lasts<sup>5</sup>.

1 See *Huguenin v Baseley* (1807) 14 Ves 273; and see MISREPRESENTATION AND FRAUD.

2 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 323; MISREPRESENTATION AND FRAUD; TRUSTS vol 48 (2007 Reissue) PARA 944.

3 See PARA 425 ante.

4 *Hylton v Hylton* (1754) 2 Ves Sen 547.

5 *Hatch v Hatch* (1804) 9 Ves 292; and see *Everitt v Everitt* (1870) LR 10 Eq 405.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/D. EXTENSIONS OF FRAUD/427. Solicitor and client.

#### **427. Solicitor and client.**

The relation of solicitor and client raises so strong a presumption of undue influence that it has been said to be almost impossible for a gift made by a client to a solicitor to stand<sup>1</sup>. The presumption is not, however, irrebuttable. It can be rebutted, in the case of a gift, by proving that the solicitor was not acting as such in the matter of the gift, and that the donor had competent, independent advice of such a nature as to show that the solicitor's influence was not operative<sup>2</sup>; and it can be rebutted, in the case of a sale, by showing that the client was fully informed, that he had competent, independent advice, and that the price was fair<sup>3</sup>.

Particular difficulties arise where a solicitor acts for two parties with conflicting interests. He can so act provided that he has obtained the informed consent of both parties: this means that each party knows that there is a conflict between himself and the other which might result in the solicitor being disabled from disclosing his full knowledge of the transaction or from giving one party advice which conflicted with the interests of the other<sup>4</sup>.

1 *Hatch v Hatch* (1804) 9 Ves 292; and see LEGAL PROFESSIONS vol 66 (2009) PARA 801 et seq.

2 *Wright v Carter* [1903] 1 Ch 27, CA.

3 *Gibson v Jeyes* (1801) 6 Ves 266 at 277; *Wright v Carter* [1903] 1 Ch 27 at 60, CA, per Stirling LJ. A solicitor proposing to buy property from, or sell to, a client is under a duty to cause him to obtain independent advice: *Longstaff v Birtles* [2001] EWCA Civ 1219, [2002] 1 WLR 470, [2001] All ER (D) 373 (Jul).

4 *Clark Boyce v Mouat* [1994] 1 AC 428, [1993] 4 All ER 268, PC; *Mahoney v Purnell* [1996] 3 All ER 61, [1997] 1 FLR 612.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/D. EXTENSIONS OF FRAUD/428. Abuse of confidence.

## 428. Abuse of confidence.

The principles of undue influence and abuse of confidence overlap but do not coincide<sup>1</sup>. In the absence of competent, independent advice a transaction between persons in the relation of solicitor and client or in a confidential relation of a similar character cannot be upheld unless the person claiming to enforce it can prove, affirmatively, that the person standing in such a confidential position has disclosed, without reservation, all the information in his possession, and can further show that the transaction was, in itself, a fair one having regard to all the circumstances<sup>2</sup>. The principle appears to be limited to the relations of trustee and beneficiary<sup>3</sup>, principal and agent<sup>4</sup>, and solicitor and client<sup>5</sup>, or of persons in similar positions<sup>6</sup>.

Where the principle does apply:

- 11 (1) it is the danger of an abuse of confidence on the part of the person in the confidential position which causes the court to apply the stringent rules which it does, before permitting him to retain a benefit from the transaction with the other party;
- 12 (2) while undue influence may also be proved as a fact, the liability and relief in cases of abuse of confidence are quite independent of the existence of undue influence as such<sup>7</sup>;
- 13 (3) in such cases, a person in a confidential position is bound to disclose to the other party everything that is or may be material to that other's judgment before the transaction is completed<sup>8</sup>; and his failure to disclose such matters is treated as being itself an abuse of confidence entitling the other party to relief;
- 14 (4) so far from the complaining party having to prove that the transaction was disadvantageous to him, the onus falls on the other party to establish its fairness<sup>9</sup>.

1 *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, CA (overruled without affecting this point by *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL). See also *Rhodes v Bate* (1865) 1 Ch App 252; *Tate v Williamson* (1866) 2 Ch App 55.

2 *Demerara Bauxite Co Ltd v Hubbard* [1923] AC 673, PC; *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, CA (overruled without affecting this point by *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL); *Bristol and West Building Society v Mothew* [1998] Ch 1, [1996] 4 All ER 698, CA; *Johnson v EBS Pensioner Trustees Ltd* [2002] EWCA Civ 164, [2002] All ER (D) 294 (Jan), [2002] Lloyd's Rep PN 309.

3 See TRUSTS vol 48 (2007 Reissue) PARAS 697, 926-928, 1109.

4 See AGENCY vol 1 (2008) PARAS 73, 82, 91-94.

5 See LEGAL PROFESSIONS vol 66 (2009) PARA 801 et seq.

6 *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, CA (overruled without affecting this point by *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL).

7 See *Moody v Cox and Hatt* [1917] 2 Ch 71 at 79-80, CA, per Lord Cozens-Hardy MR.

8 See *Moody v Cox and Hatt* [1917] 2 Ch 71 at 80, CA, per Lord Cozens-Hardy MR.

9     *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 963, [1992] 4 All ER 955 at 972-973, CA, per Slade LJ (overruled without affecting this point by *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/D. EXTENSIONS OF FRAUD/429. Unconscionable bargains; taking advantage of weakness or necessity.

#### **429. Unconscionable bargains; taking advantage of weakness or necessity.**

A contract may be stigmatised as unfair in one of two ways<sup>1</sup>:

- 15 (1) by reason of the unfair manner in which it was brought into existence ('procedural unfairness') as where it was induced by undue influence<sup>2</sup>, or where it came into being through an unconscientious use of the power arising out of the circumstances and conditions of the contracting parties<sup>3</sup>; in such cases equity may give a remedy;
- 16 (2) by reason of the fact that the terms of the contract are more unfavourable to one party than to the other ('contractual imbalance'); contractual imbalance or inadequacy of consideration is not, however, in itself a ground for relief in equity<sup>4</sup>, but it may be an element in establishing such fraud as will avoid the transaction<sup>5</sup> or the transaction may be so unconscionable as to afford in itself evidence of fraud<sup>6</sup>.

A bargain cannot be unfair and unconscionable, however, unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say in a way which affects his conscience, as by taking advantage of the weakness or necessity of the other<sup>7</sup>. In order that relief may be given it must be possible for the parties to be restored to their former position, and hence a marriage settlement cannot be set aside<sup>8</sup>.

The jurisdiction to set aside unconscionable bargains does not extend to the setting aside of gifts, but the court may intervene to set aside an 'unconscionable gift' by an application of the law on undue influence<sup>9</sup>.

1 See *Hart v O'Connor* [1985] AC 1000 at 1017, [1985] 2 All ER 880 at 887, PC, per Lord Brightman. It was observed in *Mahoney v Purnell* [1996] 3 All ER 61, [1997] 1 FLR 612 that success on the basis of unconscionable bargain may well presuppose success on the basis of undue influence. The common law doctrine of restraint of trade is quite distinct: *Georgios Panayiotou (professionally known as George Michael) v Sony Music Entertainment (UK) Ltd (formerly CBS United Kingdom Ltd)* (1994) 13 Tr LR 532, [1994] EMLR 229.

2 See PARA 417 et seq ante.

3 *Earl of Aylesford v Morris* (1873) 8 Ch App 484 at 490-491; *Hart v O'Connor* [1985] AC 1000, [1985] 2 All ER 880, PC. The view of Lord Denning in *Lloyds Bank Ltd v Bundy* [1975] QB 326 at 339, [1974] 3 All ER 757 at 765, CA, and in *Arrale v Costain Civil Engineering Ltd* [1976] 1 Lloyd's Rep 98, CA, that there is a general principle that English courts will grant relief where there is 'inequality of bargaining power' can no longer be supported: see *National Westminster Bank plc v Morgan* [1985] AC 686, [1985] 1 All ER 821, HL; *Wigan Borough Council v Green & Son (Wigan) Ltd* [1985] 2 EGLR 242, CA. See also *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303, [1985] 1 WLR 173, CA.

4 *Griffith v Spratley* (1787) 1 Cox Eq Cas 383 (in the Exchequer); *Naylor v Winch* (1824) 1 Sim & St 555 at 565; *Borell v Dann* (1843) 2 Hare 440; *Harrison v Guest* (1860) 8 HL Cas 481; *White and Carter (Councils) Ltd v McGregor* [1962] AC 413 at 445, [1961] 3 All ER 1178 at 1193, HL, per Lord Hodson ('it is trite that equity will not rewrite an improvident contract where there is no disability on either side'); *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84, [1978] 2 All ER 489; *Hart v O'Connor* [1985] AC 1000 at 1018, [1985] 2 All ER 880 at 887, PC, per Lord Brightman ('equity will not relieve a party from a contract on the ground only that there is contractual imbalance not amounting to unconscionable dealing'). As to inadequacy of consideration in bargains with expectant heirs see PARA 431 post. See also SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 868.

5 See *Earl of Aylesford v Morris* (1873) 8 Ch App 484 at 490; *Fry v Lane, Re Fry, Whittet v Bush* (1888) 40 ChD 312 at 324.

6 *Gwynne v Heaton* (1778) 1 Bro CC 1; *Heathcote v Paignon* (1787) 2 Bro CC 167; *Gibson v Jeyes* (1801) 6 Ves 266 at 273-274 per Lord Eldon ('inadequacy of consideration so gross as to shock the conscience of any man who heard the terms'); *Coles v Trecothick* (1804) 9 Ves 234 at 246; *Underhill v Horwood* (1804) 10 Ves 209; *Copis v Middleton* (1818) 2 Madd 410; *Peacock v Evans* (1809-10) 16 Ves 512; *Davies v Cooper* (1840) 5 My & Cr 270; *Cockell v Taylor* (1851) 15 Beav 103; *Tennent v Tennents* (1870) LR 2 Sc & Div 6; *Hart v O'Connor* [1985] AC 1000 at 1018, [1985] 2 All ER 880 at 887, PC, per Lord Brightman ('contractual imbalance may be so extreme as to raise a presumption of procedural unfairness, such as undue influence or some other form of victimisation').

7 *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84 at 110, [1978] 2 All ER 489 at 502 per Browne-Wilkinson J; *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303, [1985] 1 WLR 173, CA; *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221, 80 P & CR D20, CA; *Jones v Morgan* [2001] EWCA Civ 995, [2002] 1 EGLR 125, [2001] All ER (D) 314 (Jun).

8 *North v Ansell* (1731) 2 P Wms 618 at 619; *Campbell v Ingilby* (1856) 21 Beav 567 at 576; affd (1857) 1 De G & J 393.

9 *Langton v Langton* [1995] 3 FCR 521, [1995] 2 FLR 890.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/D. EXTENSIONS OF FRAUD/430. Voluntary settlement.

### **430. Voluntary settlement.**

A voluntary settlement may be set aside if its effect was not properly understood by the settlor<sup>1</sup> and, when it contains no power of revocation, his attention should be expressly called to the omission and his instructions obtained and recorded. The absence of a power of revocation, and the failure to draw attention to it, do not, however, make the settlement invalid; they are merely circumstances to be considered<sup>2</sup>.

<sup>1</sup> See *Phillips v Mullings* (1871) 7 Ch App 244; *Dutton v Thompson* (1883) 23 ChD 278, CA; and SETTLEMENTS vol 42 (Reissue) PARA 618.

<sup>2</sup> *Hall v Hall* (1873) 8 Ch App 430; and see *Villers v Beaumont* (1682) 1 Vern 100; *Petre v Espinasse* (1834) 2 My & K 496; *Bill v Cureton* (1835) 2 My & K 503; *Harvey v Mount* (1845) 8 Beav 439 at 451. A voluntary conveyance was formerly liable to be defeated by a subsequent conveyance for value (see *Buckle v Mitchell* (1812) 18 Ves 100) but this cannot result from any such conveyances made after 28 June 1893 (see the Law of Property Act 1925 s 173(2), re-enacting the Voluntary Conveyances Act 1893); and see PARA 759 post. Subject to certain exceptions, no settlement created on or after 1 January 1997 is a settlement for the purposes of the Settled Land Act 1925: see the Trusts of Land and Appointment of Trustees Act 1996 ss 2, 27; and REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/D. EXTENSIONS OF FRAUD/431. Unconscionable bargains with expectant heirs and others.

### **431. Unconscionable bargains with expectant heirs and others.**

Relief is given in equity against unconscionable bargains made with heirs and other persons on the security of their expectant or reversionary interests in property ('catching bargains' as they have been called) with heirs, reversioners and expectants during the lives of their parents or other ancestors<sup>1</sup>. These cases sometimes show actual fraud; but, without this, they contain various elements which afford a recognised ground for relief: the inequality of the parties; the intrinsic unconscionableness of the bargain; and the defeating of the ancestor's intentions<sup>2</sup>.

Formerly mere inadequacy of price was a ground for setting aside such a bargain, and the onus of proving that the price was fair was imposed on the person who had dealings with the expectant heir or reversioner<sup>3</sup>. Mere inadequacy of price is no longer a ground for equitable relief<sup>4</sup>; but neither this change in the law nor the repeal of the usury laws affected the general principles as to relief of expectant heirs<sup>5</sup>. The knowledge of, and want of protest by, the person from whom the expectancy is derived, and with yet stronger reason his sanction, removes a chief objection to the bargain, and in general will validate it<sup>6</sup>.

Apart from the fraud on the ancestor, the doctrine is founded on pressure upon the heir, or the distress of the party disposing of his expectancy<sup>7</sup>. If, when this is removed, he confirms the bargain, it will stand<sup>8</sup>.

If a transaction is set aside, it will be set aside on equitable terms<sup>9</sup>.

1 *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125; and see MISREPRESENTATION AND FRAUD.

2 *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125.

3 *Peacock v Evans* (1809-10) 16 Ves 512 at 514.

4 See the Law of Property Act 1925 s 174 (replacing the Sale of Reversions Act 1867); and MISREPRESENTATION AND FRAUD.

5 *Earl of Aylesford v Morris* (1873) 8 Ch App 484.

6 *King v Hamlet* (1834) 2 My & K 456 at 474; approved, Story, Equity Jurisprudence s 339; questioned, Sugden, Vendors and Purchasers (14th Edn) 277.

7 *King v Hamlet* (1843) 2 My & K 456 at 480 per Lord Brougham LC. While this continues, he is treated as a minor: *Gwynne v Heaton* (1778) 1 Bro CC 1 at 9.

8 *Cole v Gibbons* (1734) 3 P Wms 290; *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125; and see *Levin v Roth* [1950] 1 All ER 698n, CA (renewal of bills of exchange; no unconscionable conduct at time of renewal).

9 *St Albyn v Harding* (1859) 27 Beav 11 (sale of reversion); *Gwynne v Heaton* (1778) 1 Bro CC 1 (property to stand as security for sum advanced).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/D. EXTENSIONS OF FRAUD/432. Persons of unsound mind or suffering from weakness of mind.

#### **432. Persons of unsound mind or suffering from weakness of mind.**

Both at law and in equity, where a party to a contract is of unsound mind, the contract is voidable at his option provided that his mental disability was known or ought to have been known to the other party<sup>1</sup>. The validity of a contract entered into by a person of unsound mind who is ostensibly sane is to be judged by the same standards as a contract by a person of sound mind, and is not voidable in equity by reason of unfairness, unless such unfairness amounts to constructive or equitable fraud which would have enabled the complainant to avoid the contract even if he had been sane<sup>2</sup>.

Mere weakness of mind, short of mental disorder, is not alone a ground for relief in equity; but, if the transaction is in itself improvident or unfair, it may be set aside if there are facts showing imposition or advantage taken of the weakness of mind<sup>3</sup>.

1 Story, Equity Jurisprudence s 227. At common law a person of unsound mind could not himself plead his incapacity so as to invalidate his own acts (*Beverley's Case* (1603) 4 Co Rep 123b), though his acts might be set aside by the Crown or by his heirs (Co Litt 724a, b); but equity, in adopting the principle, confined it to acts done by such a person to the prejudice of others, and as to acts done to his own prejudice his unsoundness of mind was recognised as a ground for relief (1 Fonblanque's Treatise of Equity (5th Edn, 1820) pp 59-61; *Addison v Dawson* (1711) 2 Vern 678); and the courts of common law came to recognise that unsoundness of mind, if known to the other party, was a good defence to an action on a contract (*Molton v Camroux* (1849) 4 Exch 17, Ex Ch; *Imperial Loan Co v Stone* [1892] 1 QB 599, CA; *York Glass Co v Jubb* (1925) 134 LT 36, CA; *Hart v O'Connor* [1985] AC 1000, [1985] 2 All ER 880, PC). See also *Re Beaney* [1978] 2 All ER 595, [1978] 1 WLR 770. See further MENTAL HEALTH vol 30(2) (Reissue) PARA 600 et seq.

2 *Hart v O'Connor* [1985] AC 1000, [1985] 2 All ER 880, PC. See also *Sergison v Sealey* (1742) 2 Atk 412; *Niell v Morley* (1804) 9 Ves 478; *Selby v Jackson* (1844) 6 Beav 192 at 204; *Price v Berrington* (1851) 3 Mac & G 486.

3 *Osmond v Fitzroy* (1731) 3 P Wms 129. There is no such thing as an equitable incapacity where there is a legal capacity: *Osmond v Fitzroy* supra at 130 per Jekyll MR. See also *Clarkson v Hanway* (1723) 2 P Wms 203; *Bridgeman v Green* (1757) 2 Ves 627; *Filmer v Gott* (1774) 4 Bro Parl Cas 230; *Nantes v Corrock* (1803) 9 Ves 182; *Willan v Willan* (1810) 16 Ves 72; affd (1814) 2 Dow 274, HL; cf *Willis v Jernegan* (1741) 2 Atk 251 per Lord Hardwicke LC; *Gartside v Isherwood* (1783) 1 Bro CC 558; 1 Fonblanque's Treatise of Equity (5th Edn, 1820) p 62 et seq. The transaction is set aside, not only as against the party guilty of the fraud, but as against innocent persons claiming through him: *Huguenin v Baseley* (1807) 14 Ves 273 at 289 per Lord Eldon LC; *Bridgeman v Green* supra.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/D. EXTENSIONS OF FRAUD/433. Drunkenness.

### **433. Drunkenness.**

Drunkenness, existing at the time of a transaction to such an extent as to deprive the party of mental capacity, invalidated the transaction at law; and, if there was nothing more, equity did not interfere, either to enable one party to avoid his agreement or deed or the other party to enforce it. If, however, the party had been enticed into drink or some unfair advantage had been taken of him, equity would relieve him, even though the drunkenness was not such as to deprive him of reason<sup>1</sup>.

1 *Cooke v Clayworth* (1811) 18 Ves 12; and see CONTRACT vol 9(1) (Reissue) PARA 717.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/D. EXTENSIONS OF FRAUD/434. Surprise.

#### **434. Surprise.**

The fact that a party has acted without due deliberation, or under a misapprehension of his rights or of the effect of the transaction, is not a ground for relief in equity unless the case is one in which relief can be afforded on the ground of mistake; but, if by the conduct of the other party he has been taken unawares, and has acted without due deliberation and under confused and sudden impressions, this is a case of surprise against which equity will relieve<sup>1</sup>. The relief has been said to be given on the ground of the fraud attending the surprise<sup>2</sup>, but in general there are other circumstances, such as weakness of mind, or poverty, or inadequacy of consideration, which assist the result<sup>3</sup>. If, however, surprise or mistake is set up as a ground for resisting specific performance of an agreement, the element of fraud need not be present<sup>4</sup>.

<sup>1</sup> Story, Equity Jurisprudence s 120n (3); *Evans v Llewellyn* (1787) 2 Bro CC 150; and see *Lord Irnham v Child* (1781) 1 Bro CC 92.

<sup>2</sup> *Earl of Montague v Earl of Bath* (1693) 3 Cas in Ch 55; 1 Fonblanque's Treatise of Equity (5th Edn, 1820) p 122. This does not seem to have been relied on in *Willan v Willan* (1810) 16 Ves 72; affd (1814) 2 Dow 274, HL. Relief is not given where the party had competent, although not professional, advice: *Haberdashers' Co v Isaac* (1857) 3 Jur NS 611; affd 29 LTOS 350.

<sup>3</sup> *Pickett v Loggon* (1807) 14 Ves 215.

<sup>4</sup> *Marquis Townshend v Stangroom, Stangroom v Marquis Townshend* (1801) 6 Ves 328.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/D. EXTENSIONS OF FRAUD/435. Unfair dealing with the poor and uneducated.

### **435. Unfair dealing with the poor and uneducated.**

Equity will set aside a transaction by way of sale or otherwise by a poor and ignorant<sup>1</sup> vendor where the sale is at a considerable undervalue and the vendor has not had independent advice, unless the purchaser proves to the satisfaction of the court that the transaction was fair, just and reasonable<sup>2</sup>. The absence of independent advice from a solicitor is of special significance in conveyancing matters<sup>3</sup>. The same principle has been applied where in place of poverty and ignorance there was a desire for a quick sale and old age with accompanying diminution of capacity and judgment<sup>4</sup>.

1 'Poor' may be construed as 'being a member of the lower income group' and 'ignorant' as 'less highly educated': *Cresswell v Potter* [1978] 1 WLR 255n. See also *Rees v De Bernardy* [1896] 2 Ch 437 (communication of information on terms of getting a share of recoverable property); *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 at 151, 74 P & CR 384 at 391, CA, per Nourse LJ.

2 *Longmote v Ledger* (1860) 2 Giff 157; *Clark v Malpas* (1862) 4 De GF & J 401; *Baker v Monk* (1864) 4 De GJ & Sm 388; *Press v Coke* (1871) 6 Ch App 645; *Fry v Lane* (1888) 40 ChD 312; *Cresswell v Potter* [1978] 1 WLR 255n; *Backhouse v Backhouse* [1978] 1 All ER 1158, [1978] 1 WLR 243; *Watkin v Watson-Smith* [1986] CLY 424, (1986) Times, 3 July. Cf *Harrison v Guest* (1860) 8 HL Cas 481; *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303, [1985] 1 WLR 173, CA.

3 *Cresswell v Potter* [1978] 1 WLR 255n; *Butlin-Sanders v Butlin* [1985] FLR 204 (wife rejected advice of solicitor to take independent advice not to make gratuitous transfer to husband; transaction upheld).

4 *Watkin v Watson-Smith* [1986] CLY 424, (1986) Times, 3 July.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/D. EXTENSIONS OF FRAUD/436. Duress.

### 436. Duress.

Where a party to a transaction enters into it under duress in the strict sense, that is, where he is compelled to it by bodily restraint or fear of bodily harm, the transaction is voidable at law<sup>1</sup>; and in that case it will be set aside in equity<sup>2</sup>. Relief is, however, also granted where the compulsion is not of this extreme nature, and to avoid the transaction it is sufficient that there were such circumstances of pressure, including commercial or domestic pressure<sup>3</sup>, as to prevent the party from being a free agent<sup>4</sup>. Similarly, where a transaction is voidable, a confirmation of it procured by terror is of no effect<sup>5</sup>.

1 See CONTRACT vol 9(1) (Reissue) PARAS 710-711. 'Duress ... is a coercion of the will so as to vitiate consent': *Pao On v Lau Yiu Long* [1980] AC 614 at 635; sub nom *Pao On v Lau Yiu* [1979] 3 All ER 65 at 78, PC, per Lord Scarman.

2 *Hawes v Wyatt* (1790) 3 Bro CC 156 at 158; *Scott v Scott* (1847) 11 I Eq R 74, 487. The fact that a conveyance or contract was made in prison with a view to procuring release is not a ground for avoiding it, if it is fair and is made on proper advice (*Hinton v Hinton* (1755) 2 Ves Sen 631 at 638; *Brinkley v Hann* (1843) Drury temp Sug 175); and so as to bail given while under arrest by process of law (*Roy v Duke of Beaufort* (1741) 2 Atk 190 at 193; *Liverpool Marine Credit Co v Hunter* (1868) 3 Ch App 479, disapproving *Talleyrand v Boulanger* (1797) 3 Ves 447). If, however, owing to the arrest, there is no free consent, the court will relieve, notwithstanding that the arrest was lawful: *Nicholls v Nicholls* (1737) 1 Atk 409; *Falkner v O'Brien* (1812) 2 Ball & B 214.

3 *Occidental Worldwide Investment Corp v Skibs A/S Avanti, Skibs A/S Glarona, Skibs A/S Navolis, The Siboen and The Sibotre* [1976] 1 Lloyd's Rep 293; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705, [1978] 3 All ER 1170; *Pao On v Lau Yiu Long* [1980] AC 614; sub nom *Pao On v Lau Yiu* [1979] 3 All ER 65, PC; *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090 at 1140, [1979] 3 All ER 700 at 729-730, HL, per Lord Scarman; *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303, [1985] 1 WLR 173, CA; *Enimont Overseas AG v RO Jugotanker Zadar, The Olib* [1991] 2 Lloyd's Rep 108; and see *Woolwich Equitable Building Society v IRC* [1993] AC 70 at 118-119, sub nom *Woolwich Building Society v IRC (No 2)* [1991] 4 All ER 577 at 617-618, CA, per Ralph Gibson LJ (affd [1993] AC 70, [1992] 3 All ER 737, HL). See also *CTN Cash & Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714, CA.

4 *A-G v Sotho* (1705) 2 Vern 497; *Williams v Bayley* (1866) LR 1 HL 200; *Ellis v Barker* (1871) 7 Ch App 104; cf *Barnes v Richards* (1902) 50 WR 363. See also *Kanhaya Lal v National Bank of India* (1913) 29 TLR 314, PC (money paid to prevent compulsory sale recoverable); *Société des Hôtels Réunis SA v Hawker* (1913) 29 TLR 578; on appeal (1914) 30 TLR 423, CA (payment of cheque procured by threat of criminal proceedings in France not enforceable). 'There is an obvious analogy between the setting aside of a disposition for duress or undue influence and setting it aside for fraud': *Barton v Armstrong* [1976] AC 104 at 118, [1975] 2 All ER 465 at 474, PC, per Lord Cross.

5 *Crowe v Ballard* (1790) 1 Ves 215 at 220.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/D. EXTENSIONS OF FRAUD/437. Injury to third parties.

### 437. Injury to third parties.

Relief will be granted in equity against a transaction which involves an injury to third parties who stand in such a relation to the principal parties as to be affected by it, a rule which has been established on grounds of public policy<sup>1</sup>. Instances are afforded by marriage brokerage contracts<sup>2</sup>; by secret contracts which defeat the purpose of agreements or arrangements made on the occasion of a marriage, or the proper expectation of either spouse<sup>3</sup>; and by secret agreements between a debtor and one of his creditors which give that creditor some advantage which he would not obtain under an arrangements treating all the creditors equally and fairly<sup>4</sup>.

1 *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125 at 156 per Lord Hardwicke LC ('particular persons in contracts shall not only transact bona fide between themselves, but shall not transact mala fide in respect of other persons who stand in such a relation to either as to be affected by the contract or the consequences of it; and as the rest of mankind, beside the parties contracting, are concerned, it is properly said to be governed on public utility').

2 *Hall v Potter* (1695) Show Parl Cas 76, HL; *Drury v Hooke* (1686) 1 Vern 412; *Roberts v Roberts* (1730) 3 P Wms 66; *Cole v Gibson* (1750) 1 Ves Sen 503 at 506; *Shirley v Martin* (1779) 4 Bro Parl Cas 145n, referred to in *Roche v O'Brien* (1810) 1 Ball & B 330 at 358. Equity relieves against a bond, even though given after the marriage (*Williamson v Gihon* (1805) 2 Sch & Lef 357), and orders money already paid to be refunded (*Smith v Bruning* (1700) 2 Vern 392; *Hermann v Charlesworth* [1905] 2 KB 123, CA); and see CONTRACT vol 9(1) (Reissue) PARA 863.

3 Eg a security by husband or wife to return, to the person providing it, property provided on the marriage: *Turton v Benson* (1718) 1 P Wms 496; *Redman v Redman* (1685) 1 Vern 348; *Gale v Lindo* (1687) 1 Vern 475; *Neville v Wilkinson* (1782) 1 Bro CC 543; *Palmer v Neave* (1805) 11 Ves 165. The fraud in these cases consists 'in affecting to put the party contracting for the marriage in one situation by the articles, and putting that party in another and a worse situation by private agreement': *Palmer v Neave* supra at 167 per Grant MR. The relief being based on public policy, it is no objection that the party claiming relief was *particeps criminis* (participating in the wrong): *Redman v Redman* supra; *Vauxhall Bridge Co v Earl Spencer* (1821) Jac 64 at 67. The same principle was applied in cases where a woman about to marry made a disposition of her property in fraud of her husband's marital rights: *Countess of Strathmore v Bowes* (1789) 1 Ves 22; on appeal sub nom *Bowes v Bowes* (1797) 6 Bro Parl Cas 427, HL; 1 White & Tud LC (9th Edn) 537.

4 *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125 at 156 per Lord Hardwicke LC; *Jackman v Mitchell* (1807) 13 Ves 581. Since relief is given in such a case on grounds of public policy, a person *particeps criminis* may obtain relief: *Jackman v Mitchell* supra. A bond given for such purpose came to be recognised as bad at law, but this did not oust the jurisdiction in equity: *Jackman v Mitchell* supra at 586. In modern practice the principle is well established (*Mare v Sandford* (1859) 1 Giff 288; *McKewan v Sanderson* (1875) LR 20 Eq 65), and money paid by the debtor under the arrangement may be recovered (*Re Lenzberg's Policy* (1877) 7 ChD 650). A general deed of compromise may be repudiated by a creditor if he discovers that other creditors have been induced to execute it by a secret bargain to their advantage: *Dauglish v Tennent* (1866) LR 2 QB 49; *Re Milner, ex p Milner* (1885) 15 QBD 605, CA. The principle applies, however, only where there has been a common basis of consent between the creditors, not where their debts have been bought up separately: *Re McHenry, McDermott v Boyd, Levita's Claim* [1894] 3 Ch 365, CA. See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 653 et seq, 885; MISREPRESENTATION AND FRAUD.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/E. CONSTRUCTIVE TRUSTS/438. Constructive trust arising out of fraud.

## **E. CONSTRUCTIVE TRUSTS**

### **438. Constructive trust arising out of fraud.**

Most cases of trusts, including constructive trusts, fall within the exclusive jurisdiction<sup>1</sup>. This is not so, however, where a trust obligation arises as a direct consequence of an unlawful transaction which is impeached by the claimant. In such a case the defendant is implicated in a fraud and he is traditionally, though, it has been said<sup>2</sup>, unfortunately, described as a constructive trustee and said to be 'liable to account as constructive trustee'. Such a person is not in fact a trustee at all, even though he may be liable to account as if he were. He never assumes the position of a trustee, and if he receives the trust property at all it is adversely to the claimant by an unlawful transaction which is impugned by the claimant. In such a case the expressions 'constructive trust' and 'constructive trustee' are misleading, for there is no trust and usually no possibility of a proprietary remedy; they are 'nothing more than a formula for equitable relief'<sup>3</sup>. The equitable relief granted arises in the exercise of the court's concurrent jurisdiction<sup>4</sup>.

1 See PARA 406 ante.

2 *Paragon Finance plc v DB Thakarer & Co (a firm)*[1999] 1 All ER 400 at 409, CA, per Millett LJ.

3 *Selangor United Rubber Estates Ltd v Cradock (No 3)*[1968] 2 All ER 1073 at 1097, [1068] 1 WLR 1555 at 1582 per Ungood-Thomas J; cited by Millett LJ in *Paragon Finance plc v DB Thakarer & Co (a firm)*[1999] 1 All ER 400 at 409, CA.

4 *Paragon Finance plc v DB Thakarer & Co (a firm)*[1999] 1 All ER 400, CA. See further TRUSTS vol 48 (2007 Reissue) PARA 1134 et seq; and see eg *Papamichael v National Westminster Bank plc and Paprounis (Pt 20 defendant)*[2003] EWHC 164 (Comm), [2003] 1 Lloyd's Rep 341, [2003] All ER (D) 204 (Feb).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/F. MISTAKE/439. Mistake as a ground for relief.

## **F. MISTAKE**

### **439. Mistake as a ground for relief.**

Mistake<sup>1</sup> was a ground for relief both at law and in equity, and hence the jurisdiction was classed as concurrent; but there were differences as regards the nature of the relief and the circumstances in which it was given<sup>2</sup>.

Both in law and in equity money paid under mistake of fact was recoverable<sup>3</sup>. Until recently, however, the long-established rule was that money paid under mistake of law<sup>4</sup> could not be recovered at law<sup>5</sup>. The House of Lords has now held<sup>6</sup> that this rule no longer forms part of English law. It could not survive once it had been determined by the House of Lords<sup>7</sup> that there exists a coherent law of restitution founded upon the principle of unjust enrichment, and, within that body of law, recognition of the defence of change of position. A blanket rule of non-recovery, irrespective of the justice of the case, could not sensibly survive in a rubric of the law based on the principle of unjust enrichment; and recognition of a defence of change of position demonstrated that this must be proved in fact if it was to justify retention, in whole or in part, of money which would otherwise be repayable on the ground that the payee was unjustly enriched by its receipt. It has been said<sup>8</sup> that the law must evolve appropriate defences which can, together with the defence of change of position, provide protection where appropriate for recipients of money paid under mistake of law in those cases in which justice or policy does not require them to refund the money. However there is no principle of English law that payments made under a settled understanding of the law which is subsequently departed from by judicial decision are not recoverable in restitution on the ground of mistake; or that money paid under a void contract is not recoverable on the ground of mistake of law because the contract was fully performed. Nor is it a defence to a claim in English law for restitution of money paid or property transferred under a mistake of law that the defendant honestly believed, when he learned of the payment or transfer, that he was entitled to retain the money or property<sup>9</sup>.

Estoppel by representation<sup>10</sup> may also be a defence against a claimant who seeks to recover a mistaken payment from the defendant. Estoppel by representation normally requires that a more than minimal degree of detriment is definitive of the transferee's right to retain the entirety of a mistaken payment even if this leaves the defendant with a windfall<sup>11</sup>; however there are exceptions to this strict rule which are, or include, cases where it would be unconscionable or wholly inequitable to permit the recipient of money to retain the whole of it<sup>12</sup>.

Where there is a voluntary transaction by which one party intends to confer a bounty on another, the deed will be set aside if the court is satisfied that the disponent did not intend the transaction to have the effect which it did. It will be set aside for mistake whether the mistake is a mistake of law or of fact, so long as the mistake is as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it<sup>13</sup>.

1 See MISTAKE vol 77 (2010) PARA 1 et seq.

2 As to relief against forfeiture on the ground of mistake see PARA 804 note 14 post.

3 *Kelly v Solari* (1841) 9 M & W 54; *Durrant v Ecclesiastical Comrs* (1880) 6 QBD 234; *Norwich Union Fire Insurance Society Ltd v Wm H Price Ltd* [1934] AC 455, PC; *Chase Manhattan Bank NA v Israel-British Bank*

(London) Ltd[1981] Ch 105, [1979] 3 All ER 1025; *Laimond Property Investment Co Ltd v Arlington Park Mansions Ltd*[1989] 1 EGLR 208, CA; *Rover International Ltd v Cannon Film Sales Ltd (No 3)*[1989] 3 All ER 423, [1989] 1 WLR 912, CA. However in the light of the decision in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[1996] AC 669, [1996] 2 All ER 961, HL, the reasoning in *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* supra that a person who pays money to another under a mistake of fact retains an equitable property in it, and that the conscience of that other is subjected to a fiduciary duty to respect his proprietary right, is at best doubtful (*Hillsdown Holdings plc v Pensions Ombudsman*[1997] 1 All ER 862 at 904 per Knox J), though the actual result may be supported on the ground of constructive trust.

4 'Law' in this connection meant a general principle of law, and not that particular application of law to fact which determines the private right of the party in the subject matter of the contract. Such a private right is a matter of fact: *Cooper v Phibbs*(1867) LR 2 HL 149 at 170 per Lord Westbury; *Earl Beauchamp v Winn*(1873) LR 6 HL 223; *Allcard v Walker*[1896] 2 Ch 369 at 381. See also *Jones v Clifford*(1876) 3 ChD 779 at 792; *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd*[1895] 2 Ch 273, CA.

5 *Bilbie v Lumley* (1802) 2 East 469. In equity, however, although money paid under mistake of law could not in general be recovered (*Rogers v Ingham*(1876) 3 ChD 351, CA), the plaintiff (now known as 'the claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18) might obtain relief if there were circumstances which made it inequitable that the party who had received the money should retain it (*Rogers v Ingham* supra; and see *Stone v Godfrey* (1854) 5 De GM & G 76; *Re Saxon Life Assurance Society* (1862) 2 John & H 408; on appeal 1 De GJ & Sm 29; *Kirri Cotton Co Ltd v Dewani*[1960] AC 192 at 204, [1960] 1 All ER 177 at 181, PC). Money paid under mistake of law may in certain circumstances be recovered from an innocent volunteer: *Re Diplock, Diplock v Wintle*[1948] Ch 465, [1948] 2 All ER 318 at 429, CA; affd sub nom *Ministry of Health v Simpson*[1951] AC 251, [1950] 2 All ER 1137, HL; and see PARA 865 post. A trustee in bankruptcy who receives money paid under a mistake of law must, as an officer of the court, act in a high-principled way by repaying it: *Re Condon, ex p James*(1874) 9 Ch App 609; and see *Re Tyler, ex p Official Receiver*[1907] 1 KB 865, CA; *Re Craig & Sons, ex p Hinchcliffe*[1916] 2 KB 497. A rating authority must act in the same high-principled way: *Tower Hamlets London Borough Council v Chetnik Developments Ltd*[1988] AC 858, [1988] 1 All ER 961, HL. See also *Woolwich Equitable Building Society v IRC*[1993] AC 70, sub nom *Woolwich Building Society v IRC (No 2)*[1991] 4 All ER 577, CA; affd [1993] AC 70, [1992] 3 All ER 737, HL; BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 459; and MISTAKE vol 77 (2010) PARA 69 et seq. In particular, if a legatee who was unpaid exhausted his remedy against the executor and sued the person to whom the money had wrongly been paid, refunding might be ordered whether the executor's mistake was of law or fact: *Ministry of Health v Simpson*[1951] AC 251 at 270, [1950] 2 All ER 1137 at 1143, HL, per Lord Simonds. It is uncertain whether a claim lies in similar circumstances in the execution of a trust as opposed to the administration of the estate of a deceased person: see *Ministry of Health v Simpson* supra at 265-266 and at 1140 per Lord Simonds. See also *Butler v Broadmead*[1975] Ch 97, [1974] 2 All ER 401; *Re J Leslie Engineers Co Ltd (in liquidation)*[1976] 2 All ER 85, [1976] 1 WLR 292.

6 *Kleinwort Benson Ltd v Lincoln City Council*[1999] 2 AC 349, [1998] 4 All ER 513, HL; and see *Nurdin & Peacock plc v DB Ramsden & Co Ltd*[1999] 1 All ER 941, [1999] 1 WLR 1249; *Deutsche Morgan Grenfell Group plc v IRC*[2003] EWHC 1779 (Ch), [2003] NLJR 1171, [2003] All ER (D) 321 (Jul).

7 See in *Lipkin Gorman (a firm) v Karpnale Ltd*[1991] 2 AC 548, [1992] 4 All ER 512, HL.

8 See *Kleinwort Benson Ltd v Lincoln City Council*[1999] 2 AC 349 at 373, [1998] 4 All ER 513 at 530, HL, per Lord Goff of Chieveley.

9 *Kleinwort Benson Ltd v Lincoln City Council*[1999] 2 AC 349, [1998] 4 All ER 513, HL.

10 As to estoppel by representation see ESTOPPEL vol 16(2) (Reissue) PARA 1052 et seq.

11 *Avon County Council v Howlett*[1983] 1 All ER 1073, [1983] 1 WLR 605, CA.

12 *Scottish Equitable plc v Derby*[2000] 3 All ER 793, [2001] 2 All ER (Comm) 119 (affd [2001] EWCA Civ 369, [2001] 3 All ER 818, [2001] 2 All ER (Comm) 274); *National Westminster Bank plc v Somer International UK Ltd*[2001] EWCA Civ 970, [2002] QB 1286, [2002] 1 All ER 198; and see ESTOPPEL vol 16(2) (Reissue) PARA 1081.

13 *Gibbon v Mitchell*[1990] 3 All ER 338, [1990] 1 WLR 1304; and see MISTAKE vol 77 (2010) PARA 54.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/F. MISTAKE/440. Mistake in language of agreement.

#### **440. Mistake in language of agreement.**

A mistake in an executory agreement may be either in the language of the agreement or in regard to circumstances inducing the agreement. There is a mistake in the language when it does not represent the actual intention of one or both parties. If the parties have reached agreement, but by mistake this has not been correctly expressed in a document purporting to state what they have agreed, upon proof of their having come to agreement, equity will order rectification of that document at the instance of either party<sup>1</sup>. It is unnecessary to find a concluded and binding contract between the parties antecedent to the agreement which it is sought to rectify; it is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement<sup>2</sup>. There must, however, be some outward expression of their continuing common intention in relation to the provision in dispute<sup>3</sup>, and that common intention must be formulated with certainty<sup>4</sup>. It is not enough to establish the existence of an antecedent agreement whose terms differ from those of the instrument which is sought to be rectified, unless it is also established that the instrument was intended to carry out the terms of the agreement and not to vary them. If the evidence shows that the parties have changed their intentions and the instrument represents their altered intentions, there is no scope for rectification<sup>5</sup>. It is not a bar to relief that the need for rectification arises from an error of the claimant's solicitors; and in general negligence is an irrelevant consideration<sup>6</sup>. If, in a written agreement, one party has used language which does not express his intention, he is without remedy at law, since he cannot give parol evidence to contradict the written instrument<sup>7</sup>; but he will be relieved in equity<sup>8</sup> if the mistake was caused by the other party or, in cases of specific performance, if it involves serious hardship<sup>9</sup> and was not due to mere carelessness<sup>10</sup>. Rectification may be an appropriate remedy if the parties addressed their minds to, and were under a common mistake as to, the legal effect of a provision in a deed<sup>11</sup>.

Where the mistake is unilateral, rectification will not usually be available, but the parties may be restored to their original position by rescission of the contract<sup>12</sup>, although the defendant may elect to have rectification<sup>13</sup>. If, however, one party knows that the instrument contains a mistake in his favour but does nothing to correct it, he will not be able to resist rectification on the ground that the mistake is unilateral<sup>14</sup>; it is not necessary to show that the defendant was guilty of sharp practice so long as it can be shown that it would be inequitable to allow him to object to rectification of the document<sup>15</sup>. It has been said to be sufficient that the defendant had wilfully shut his eyes to the obvious, or had wilfully and recklessly failed to make such inquiries as an honest and reasonable person would make<sup>16</sup>.

The court has jurisdiction to rectify a voluntary settlement<sup>17</sup>, but will not do so against the wishes of the settlor<sup>18</sup>. Rectification may be decreed after the death of the settlor<sup>19</sup>. If the settlement involved an actual bargain between the settlor and the trustees it seems that a mutual mistake would be required, but in other cases a settlor may seek rectification by proving that the settlement does not express his true intention<sup>20</sup>. It is not essential for him to prove that the settlement fails to express the true intention of the trustees if they have not bargained, but the court in its discretion may decline to rectify a settlement against a protesting trustee who objects to rectification<sup>21</sup>. It is not enough for the judge to consider that the proposed rectification would be more in accord with recognised precedents and would improve the settlement, or that if the settlor's attention had been drawn to the point it seems clear that he would have approved it<sup>22</sup>.

Mistake may also be set up as a defence to a claim for specific performance. Formerly a successful defence would still have left the mistaken party liable to an action at law, and this result is in effect preserved by the present rule that the court which refuses specific performance can give the damages, if any, to which the claimant may be entitled<sup>23</sup>. If the words are capable of a double meaning, a party may first set up his own construction as being the right one and, if he fails, may then seek relief on the ground of mistake<sup>24</sup>; but, if the words are clear, the party cannot have relief on the ground that he was mistaken as to their legal effect<sup>25</sup>, or as to the nature of the obligations which he has undertaken<sup>26</sup>, unless the mistake has been induced by the other party<sup>27</sup>.

1 *Henkle v Royal Exchange Assurance Co* (1749) 1 Ves Sen 317; *Countess Dowager of Shelburne v Earl of Inchiquin* (1784) 1 Bro CC 338; affd sub nom *Earl of Inchiquin v Fitzmaurice* (1785) 5 Bro Parl Cas 166, HL; *Marquis Townshend v Stangroom*, *Stangroom v Marquis Townshend* (1801) 6 Ves 328; *Paget v Marshall* (1884) 28 ChD 255; *Crane v Hegeman-Harris Co Inc* [1939] 4 All ER 68, CA; *Frederick E Rose (London) Ltd v Wm H Pim, Junior & Co Ltd* [1953] 2 QB 450, [1953] 2 All ER 739, CA; *Wilson v Wilson* [1969] 3 All ER 945, [1969] 1 WLR 1470; *Re Colebrook's Conveyance* [1973] 1 All ER 132, [1972] 1 WLR 1397; *Re Sloccock's Will Trusts* [1979] 1 All ER 358; *Thames Guaranty Ltd v Campbell* [1985] QB 210, [1984] 2 All ER 585, CA; *AMP (UK) Ltd v Barker* (2000) 3 ITELR 414; and see MISTAKE vol 77 (2010) PARA 57 et seq. Rectification will not, however, be ordered after the agreement has been construed by the court, and executed by payment of money under the judgment of the court: *Caird v Moss* (1886) 33 ChD 22, CA; cf *Crane v Hegeman-Harris Co Inc* [1939] 1 All ER 662.

2 *Crane v Hegeman-Harris Co Inc* [1939] 1 All ER 662 at 664 per Simonds J; on appeal [1939] 4 All ER 68, CA; *Joscelyne v Nissen* [1970] 2 QB 86, [1970] 1 All ER 1213, CA. See also *Lloyd v Stanbury* [1971] 2 All ER 267, [1971] 1 WLR 535 (no common intention established); *Olympia Sauna Shipping Co SA v Shinwa Kaiun Kaisha Ltd*, *The Ypatia Halcoussi* [1985] 2 Lloyd's Rep 364; *Grand Metropolitan plc v William Hill Group Ltd* [1997] 1 BCLC 390.

3 *Frederick E Rose (London) Ltd v Wm H Pim, Junior & Co Ltd* [1953] 2 QB 450, [1953] 2 All ER 739, CA, per Denning LJ; *Joscelyne v Nissen* [1970] 2 QB 86, [1970] 1 All ER 1213, CA; *Excess Life Assurance Co Ltd v Firemen's Insurance Co of Newark New Jersey* [1982] 2 Lloyd's Rep 599; *Rhodian River Shipping Co SA and Rhodian Sailor Shipping Co SA v Halla Maritime Corpn*, *The Rhodian River and Rhodian Sailor* [1984] 1 Lloyd's Rep 373; *Grand Metropolitan plc v William Hill Group Ltd* [1997] 1 BCLC 390; but see *Mace v Rutland House Textiles Ltd (in administrative receivership)* [1999] 46 LS Gaz R 37, [1999] All ER (D) 1293 (claimant allowed to show that solicitor's mistake entitled him to rectification, even though solicitor could not provide clear and convincing evidence of his mistake).

4 *CH Pearce & Sons Ltd v Stonechester Ltd* (1983) Times, 17 November. See also *Pappadakis v Pappadakis* (2000) Times, 19 January; *Bidwell v Little* [2002] All ER (D) 138 (Nov).

5 *Breadalbane v Chandos* (1837) 2 My & Cr 711; *Hills v Rowland* (1853) 4 De GM & G 430; *Gilhespie v Burdis* (1943) 169 LT 91. Cf *Bold v Hutchinson* (1855) 5 De GM & G 558; *Viditz v O'Hagan* [1899] 2 Ch 569 (marriage settlements).

6 *Weeds v Blaney* (1977) 247 Estates Gazette 211, CA.

7 *Druiff v Lord Parker* (1868) LR 5 Eq 131. In equity parol evidence of mistake may be given to resist specific performance (*Marquis Townshend v Stangroom*, *Stangroom v Marquis Townshend* (1801) 6 Ves 328), but not to obtain it (*Higginson v Clowes* (1808) 15 Ves 516).

8 *Webster v Cecil* (1861) 30 Beav 62 (mistake in price); *Manser v Back* (1848) 6 Hare 443 (mistake in not reserving a right of way); *Hickman v Berens* [1895] 2 Ch 638, CA (mistake in description of intended subject matter of compromise). Relief will be granted notwithstanding the fact that the mistake has been induced innocently: *Wilding v Sanderson* [1897] 2 Ch 534, CA; *Faraday v Tamworth Union* (1916) 86 LJ Ch 436.

9 *Higginson v Clowes* (1808) 15 Ves 516; *Preston v Luck* (1884) 27 Ch D 497, CA; *Goddard v Jeffreys* (1881) 30 WR 269.

10 *Tamplin v James* (1880) 15 ChD 215, CA; *Van Praagh v Everidge* [1902] 2 Ch 266; revsd on another ground [1903] 1 Ch 434, CA; and see *Swaishland v Dearsley* (1861) 29 Beav 430 at 433; *Goddard v Jeffreys* (1881) 30 WR 269.

11 *Burroughes v Abbott* [1922] 1 Ch 86; *Jervis v Howle and Talke Colliery Co Ltd* [1937] Ch 67, [1936] 3 All ER 193; *Re Butlin's Settlement Trusts* [1976] Ch 251, [1976] 2 All ER 483; *Co-operative Insurance Society Ltd v Centremoor Ltd* (1983) 268 Estates Gazette 1027, CA. See also *Rafsanjan Pistachio Producers Co-operative v Reiss* [1990] BCLC 352.

12 *Paget v Marshall* (1884) 28 ChD 255; *Redbridge London Borough v Robinson Rentals Ltd* (1969) 211 Estates Gazette 1125; *Riverlate Properties Ltd v Paul* [1975] Ch 133, [1974] 2 All ER 656, CA; *Laimond Property Investment Co Ltd v Arlington Park Mansions Ltd* [1989] 1 EGLR 208, CA.

13 *Paget v Marshall* (1884) 28 ChD 255.

14 *A Roberts & Co Ltd v Leicestershire County Council* [1961] Ch 555, [1961] 2 All ER 545; *Riverlate Properties Ltd v Paul* [1975] Ch 133 at 140, [1974] 2 All ER 655 at 660, CA; *Weeds v Blaney* (1977) 247 Estates Gazette 211, CA.

15 *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077, [1981] 1 WLR 505, CA. See also *Ets Georges et Paul Levy v Adderley Navigation Co Panama SA* [1980] 2 Lloyd's Rep 67; *Agip SpA v Navigazione Italia SpA* [1984] 1 Lloyd's Rep 353, CA; *Black King Shipping Corp and Wayang (Panama) SA v Mark Ranold Massie, The Litsion Pride* [1985] 1 Lloyd's Rep 437 at 476-477 per Hirst J; *Olympia Sauna Shipping Co SA v Shinwa Kaiun Kaisha Ltd, The Ypatia Halcoussi* [1985] 2 Lloyd's Rep 364; *Kemp v Neptune Concrete* [1988] 2 EGLR 87, CA; *Coles v William Hill Organisation Ltd* [1998] 11 LS Gaz R 37.

16 *Coles v William Hill Organisation Ltd* [1998] 11 LS Gaz R 37.

17 It may do so both at the instance of the settlor (*Re Butlin's Settlement Trust* [1976] Ch 251, [1976] 2 All ER 483); and also at the instance of a beneficiary, even if he is a volunteer (*Thompson v Whitmore* (1860) 1 John & H 268; *Weir v Van Tromp* (1900) 16 TLR 531).

18 *Broun v Kennedy* (1863) 33 Beav 133 at 147; affd (1864) 4 De G J & Sm 217; *Weir v Van Tromp* (1900) 16 TLR 531; *Van der Linde v Van der Linde* [1947] Ch 306.

19 *Lister v Hodgson* (1867) LR 4 Eq 30 at 34 per Romilly MR.

20 Or the true intention of himself and any party with whom he has bargained. The court is slow to act on the evidence of the settlor alone, unsupported by other evidence: *Rake v Hooper* (1900) 83 LT 669; *Constandinidi v Ralli* [1935] Ch 427; *Van der Linde v Van der Linde* [1947] Ch 306.

21 *Re Butlin's Settlement Trusts* [1976] Ch 251, [1976] 2 All ER 483.

22 *Tankel v Tankel* [1999] 1 FLR 676, [1999] Fam Law 93. See also the cases cited in notes 20-21 supra.

23 *Tamplin v James* (1880) 15 ChD 215, CA; and see PARA 410 note 4 ante.

24 *Wilding v Sanderson* [1897] 2 Ch 534, CA. He may elect to enforce the contract according to the construction admitted by the other side: *Preston v Luck* (1884) 27 ChD 497, CA; and see *Rich v Jackson* (1794) 4 Bro CC 514; *Marquis Townshend v Stangroom, Stangroom v Marquis Townshend* (1801) 6 Ves 328 at 334.

25 *Powell v Smith* (1872) LR 14 Eq 85.

26 *Stewart v Kennedy* (1890) 15 App Cas 108 at 118, 121, HL.

27 *Wilding v Sanderson* [1897] 2 Ch 534 at 550, CA, per Lindley LJ.

## UPDATE

### 440 Mistake in language of agreement

NOTES 14-16--A successful rectification claim based on unilateral mistake will usually call into question the honesty of the defendant: *George Wimpey UK Ltd v VI Construction Ltd* [2005] EWCA Civ 77, (2005) Times, 16 February.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/F. MISTAKE/441. Mistake in circumstance inducing agreement.

#### **441. Mistake in circumstance inducing agreement.**

At common law mistake will render the contract void where the parties contracted under the common mistaken assumption that the subject matter of the contract existed when, in fact, that was not the case<sup>1</sup>. Mistake as to the quality of the thing contracted for will, however, have no effect unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be<sup>2</sup>. It has recently been decided<sup>3</sup> that a line of authorities<sup>4</sup> which held that a contract is liable to be set aside in equity if the parties were under a common misapprehension either as to facts, or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault cannot stand with a previous House of Lords decision<sup>5</sup>. There is no jurisdiction in equity to grant rescission of a contract on the ground of common mistake where that contract is valid and enforceable on ordinary principles of contract law<sup>6</sup>; a mere unilateral mistake on the part of the claimant, unknown to the defendant, does not entitle the claimant to rescission, with or without the option of rectification<sup>7</sup>.

1 See eg *Couturier v Hastie* (1856) 5 HL Cas 673, HL. See also *Bell v Lever Bros Ltd* [1932] AC 161, HL; and MISTAKE vol 77 (2010) PARAS 19-21.

2 *Bell v Lever Bros Ltd* [1932] AC 161, HL (no operative mistake where substantial compensation paid for termination of contracts of service in ignorance of fact that defendants had committed serious breaches of their contracts which would have justified summary dismissal without compensation); and see MISTAKE vol 77 (2010) PARAS 22-24.

3 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd, The Great Peace* [2002] EWCA Civ 1407, [2003] QB 679, [2002] 4 All ER 689.

4 Ie *Solle v Butcher* [1950] 1 KB 671, [1949] 2 All ER 1107, CA; *Leaf v International Galleries* [1950] 2 KB 86, [1950] 1 All ER 693, CA; *Frederick E Rose (London) Ltd v Wm H Pim Jnr & Co Ltd* [1953] 2 QB 450, [1953] 2 All ER 739, CA; *Oscar Chess Ltd v Williams* [1957] 1 All ER 325, [1957] 1 WLR 370, CA; *Grist v Bailey* [1967] Ch 532, [1966] 2 All ER 875; *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507, [1969] 2 All ER 891, CA; *Laurence v Lexcourt Holdings Ltd* [1978] 2 All ER 810, [1978] 1 WLR 1128; *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902, [1989] 1 WLR 255; *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932, [1994] 1 WLR 1016, CA; *Clarion Ltd v National Provident Institution* [2000] 2 All ER 265, [2000] 1 WLR 1888; *West Sussex Properties Ltd v Chichester District Council* [2000] All ER (D) 887, CA.

5 Ie *Bell v Lever Bros Ltd* [1932] AC 161, HL.

6 See *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd, The Great Peace* [2002] EWCA Civ 1407 at [157], [2003] QB 679, [2002] 4 All ER 689 per Lord Phillips of Worth Matravers MR, delivering the judgment of the court.

7 *Riverlate Properties Ltd v Paul* [1975] Ch 133, [1974] 2 All ER 656, CA.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/F. MISTAKE/442. Compromise made under mistake.

#### **442. Compromise made under mistake.**

Special considerations apply to a compromise of family rights entered into under a mistake of fact or law. A compromise assumes that the rights of the parties are doubtful, and the compromise is effected for the purpose of settling their interests in property, or their claims against each other, without resorting to or without continuing litigation; and, in general, it would defeat the object of the compromise if it could be set aside on the ground of mistake. So far as the rights depend on matters of fact, it is the duty of each party to disclose to the other all relevant facts known to himself<sup>1</sup>. If, owing to a failure in this respect, either party enters into the compromise under a mistake of fact, it has been held that the compromise will be set aside and, generally, it appears that a compromise may be set aside for mistake of fact, unless the doubtfulness of the fact was the ground of compromise<sup>2</sup>; but this may no longer be the position if the principles now having effect in relation to ordinary contracts<sup>3</sup> are applied<sup>4</sup>.

If rights depend on questions of law, a distinction may be drawn between cases where the law is clear and cases where it is doubtful. If the law is regarded as clear and the facts are admitted, the rights are not in doubt; the basis for a compromise does not exist, and a compromise entered into in such circumstances will be set aside<sup>5</sup>. If the rights depend upon doubtful law, however, or upon the doubtful construction of a document, mistake as to these rights is no ground for setting the compromise aside<sup>6</sup>.

1 *Gordon v Gordon* (1821) 3 Swan 400; *Harvey v Cooke* (1827) 4 Russ 34 at 58; *Smith v Pincombe* (1852) 3 Mac & G 653; *Greenwood v Greenwood* (1863) 2 De GJ & Sm 28 at 42. In cases of compromise the withholding of knowledge by one side amounts, in the view of a court of equity, to fraud: *Brooke v Lord Mostyn* (1864) 2 De GJ & Sm 373 at 416; on appeal sub nom *Mostyn v Brooke* (1866) LR 4 HL 304. As to what facts are relevant see *Maynard v Eaton* (1874) 9 Ch App 414. The duty of disclosure seems to be confined to cases of compromise by way of family arrangement: see *Turner v Green* [1895] 2 Ch 205.

2 See 2 Vaizey's Settlements of Property 1502; and MISTAKE vol 77 (2010) PARA 25.

3 See PARA 441 ante.

4 The courts should be very slow to set aside and declare compromise agreements void on the ground of alleged common mistakes of fact or law; before declaring a compromise agreement void, the court has to be satisfied that the mistake was both common and fundamental to the making of the agreement: see *Brennan v Bolt Burdon* [2003] EWHC 2493 (QB), [2003] All ER (D) 488 (Oct).

5 *Naylor v Winch* (1824) 1 Sim & St 555; *Lansdown v Lansdown* (1730) Mos 364; *Gibbons v Gaunt* (1799) 4 Ves 840 at 849; *Stockley v Stockley* (1812) 1 Ves & B 23 at 31.

6 *Cann v Cann* (1721) 1 P Wms 723; *Hotchkis v Dickson* (1820) 2 Bligh 303 at 348, HL; *Stewart v Stewart* (1839) 6 Cl & Fin 911 at 966-970, HL; and see *Miles v New Zealand Alford Estate Co* (1886) 32 ChD 266 at 291, CA. It is sufficient if the parties genuinely consider the question in dispute to be doubtful: *Re Midland Union, Burton-upon-Trent, Ashby-de-la-Zouch and Leicester Rly Co, Lucy's Case* (1853) 4 De GM & G 356. If the position as to the rights is known to the party's legal adviser, though the party himself may not understand it, the compromise will not be set aside (*Stewart v Stewart* (1839) 6 Cl & Fin 911, HL); it is otherwise if it was entered into in consequence of an erroneous view of the facts or of the law taken by the solicitor acting for all parties (*Re Roberts, Roberts v Roberts* [1905] 1 Ch 704, CA).

#### **UPDATE**

#### **442 Compromise made under mistake**



NOTE 4--*Brennan*, cited, reversed: [2004] EWCA Civ 1017, (2004) Times, 27 August (compromise agreement should not be set aside lightly).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/F. MISTAKE/443. Mistake in executed transaction.

#### **443. Mistake in executed transaction.**

Where a transaction has been completed by the execution of a deed or other instrument, but the instrument does not express what the parties had agreed, it will be rectified if proof of their agreement can be produced<sup>1</sup>. A common error as to parcels may be amended by rectification of the conveyance<sup>2</sup>; but, if, under a mistake of law, the parties have intentionally executed the instrument in a particular form, it will not be rectified so as to incorporate provisions which they would have inserted had they known the law<sup>3</sup>.

A unilateral mistake, whether of fact<sup>4</sup> or of law, in a deed or other instrument of conveyance is not in general a ground for setting aside the instrument where the mistake has not been induced by fraud. The position is similar to cases of innocent misrepresentation<sup>5</sup>. In the case of a defect in title being overlooked by mistake, the remedy, as between vendor and purchaser, is on the vendor's covenants<sup>6</sup>; but there is an exception in the case of a conveyance to the purchaser of property which was already his own, in which case the purchase money is recoverable<sup>7</sup>.

1 *Craddock Bros Ltd v Hunt* [1923] 2 Ch 136, CA; and see MISTAKE vol 77 (2010) PARA 57 et seq.

2 *Beale v Kyte* [1907] 1 Ch 564, questioning *Bloomer v Spittle* (1872) LR 13 Eq 427.

3 *Lord Irnham v Child* (1781) 1 Bro CC 92; and see *Pullen v Ready* (1743) 2 Atk 587 at 591.

4 *Brownlie v Campbell* (1880) 5 App Cas 925 at 937, HL, per Lord Selborne LC; *Blacklocks v JB Developments (Godalming) Ltd* [1982] Ch 183, [1981] 3 All ER 392.

5 See PARA 414 ante.

6 See *Clayton v Leech* (1889) 41 ChD 103, CA; *Debenham v Sawbridge* [1901] 2 Ch 98 at 109.

7 *Bingham v Bingham* (1748) 1 Ves Sen 126 at 127; Belt's Sup 79; and see *Cooper v Phibbs* (1867) LR 2 HL 149 at 164; *Jones v Clifford* (1876) 3 ChD 779 at 791; but see *Stewart v Stewart* (1839) 6 Cl & Fin 911 at 968, HL.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/F. MISTAKE/444. Mistake in will.

#### **444. Mistake in will.**

If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence of a clerical error<sup>1</sup> or of a failure to understand his instructions, it may order that the will be rectified so as to carry out his intentions<sup>2</sup>. An application for such an order may not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out<sup>3</sup>.

1 For the meaning of 'clerical error' for these purposes see *Wordingham v Royal Exchange Trust Co Ltd* [1992] Ch 412, [1992] 3 All ER 204 (failure by draftsman of will to incorporate clause exercising power of appointment as result of inadvertence rather than misunderstanding of instructions was clerical error); *Re Segelman* [1996] Ch 171, [1995] 3 All ER 676. See also *Walker v Geo H Medlicott & Son (a firm)* [1999] 1 All ER 685, [1999] 1 WLR 727, CA; distinguished in *Horsfall v Haywards (a firm)* [1999] 1 FLR 1182, [1999] Fam Law 383, CA.

2 Administration of Justice Act 1982 s 20(1); and see WILLS vol 50 (2005 Reissue) PARA 408. Prior to 1983 there was no jurisdiction to rectify a will, though there was jurisdiction to omit words from probate on proof they had been included through fraud or mistake: see WILLS vol 50 (2005 Reissue) PARA 408. As to correction of mistakes as a matter of construction see WILLS vol 50 (2005 Reissue) PARA 477.

3 *Ibid* s 20(2).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/G. ACCIDENT/(A) Historical Development of the Jurisdiction/445. Relief in respect of accident.

## **G. ACCIDENT**

### **(A) HISTORICAL DEVELOPMENT OF THE JURISDICTION**

#### **445. Relief in respect of accident.**

Equity afforded relief in certain cases of accident<sup>1</sup>; and, since the jurisdiction was exercised in respect of claims which were also enforceable at law, it was classed as concurrent<sup>2</sup>. Such jurisdiction was not, however, concurrent in the sense that the plaintiff<sup>3</sup> could at his option sue either at law or in equity. If he had an action at law, he was confined to that remedy; but, if by accident his legal remedy was not available, equity supplied a corresponding remedy to take its place.

1 The term 'accident' includes not merely inevitable casualty, or what is known as vis major, but such unforeseen events, misfortunes, losses, acts or omissions as are not the result of any negligence or misconduct of the party claiming relief: Story, Equity Jurisprudence s 78. As to cases of accident recognised at law see 3 Bl Com (14th Edn) 431. Inevitable accident no longer exists as a separate defence to a claim for negligence: see TORT vol 45(2) (Reissue) PARA 362.

2 As to relief against forfeiture on the ground of accident see PARA 804 note 14 post.

3 A 'plaintiff' in civil proceedings is now generally known as a 'claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/G. ACCIDENT/(A) Historical Development of the Jurisdiction/446. Loss or destruction of instruments.

#### 446. Loss or destruction of instruments.

Cases of accident arise where documents required to establish a personal claim, or a title to land or other property, have been lost or destroyed. In the case of a bond, its production<sup>1</sup> was originally necessary at law, and the loss or destruction of the bond made the action at law impossible; hence the obligee was allowed a remedy in equity in place of that which he had lost at law. Proceedings in equity had the further advantage that the terms of the indemnity to be given by the plaintiff<sup>2</sup> could be satisfactorily settled, and that all parties liable, whether as principals or sureties, could be brought before the court and their rights and liabilities adjusted<sup>3</sup>.

In the case of signed writings, their production was not necessary; but, where the instrument was lost, equity exercised jurisdiction, since it had the means of requiring an indemnity<sup>4</sup>, and in the case of a lost negotiable instrument there was the further reason that no remedy at law was available<sup>5</sup>. In the case of the destruction of the instrument the legal remedy was available; and, since an indemnity was not required, equity declined jurisdiction<sup>6</sup>.

1 le 'profert'.

2 A 'plaintiff' in civil proceedings is now generally known as a 'claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

3 *East India Co v Boddam* (1804) 9 Ves 464. The requirement of profert was at length dispensed with at law (*Read v Brookman* (1789) 3 Term Rep 151 at 156-158), a change which was not favourably regarded in equity, since the procedure in equity was more suitable for such cases (*Ex p Greenway* (1802) 6 Ves 812); but it did not take away the jurisdiction in equity (*Atkinson v Leonard* (1791) 3 Bro CC 218; *Toulmin v Price* (1800) 5 Ves 235 at 239; *Bromley v Holland, Tyrrell and Oakden* (1802) 7 Ves 3 at 19; *Kemp v Pryor* (1802) 7 Ves 237 at 249; and see PARA 404 note 2 ante).

4 *Walmsley v Child* (1749) 1 Ves Sen 341. In cases of a claim in equity for substantial relief on the ground of the loss or destruction of an instrument the plaintiff had to annex to his claim an affidavit of such loss or destruction in order to found the jurisdiction; but this was not necessary if he came for discovery only, and not for substantial relief: *Walmsley v Child* supra. Cf *Whitfield v Fausset* (1750) 1 Ves Sen 387 at 392. 'Discovery' is now known as 'disclosure': see CIVIL PROCEDURE vol 11 (2009) PARA 538 et seq.

5 In *Mossop v Eadon* (1810) 16 Ves 430, where no indemnity was necessary, relief was refused in equity since it was supposed that an action on the instrument, half of which was lost, would lie at law: see *Glynn v Bank of England* (1750) 2 Ves Sen 38. In *Hansard v Robinson* (1827) 7 B & C 90, however, it was held that an action at law would not lie because the plaintiff was not in a position to deliver up the instrument on payment: see *Crowe v Clay* (1854) 9 Exch 604. In consequence of this, equity assumed jurisdiction in the case of lost instruments on the ground of the failure of the remedy at law, and quite apart from the question of indemnity: *Macartney v Graham* (1828) 2 Sim 285. The decision in *Hansard v Robinson* supra was also based on the consideration that equity was the proper tribunal in the case of lost instruments, since it could require indemnity. By the Common Law Procedure Act 1854 s 87 (repealed) power to require this in regard to negotiable instruments was conferred on the common law courts: *King v Zimmerman* (1871) LR 6 CP 466. As to claims on lost bills see now the Bills of Exchange Act 1882 s 70; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1508. In the case of a lost insurance policy the court's decree directing payment is a sufficient indemnity to the office, and no indemnity from the payee may be required: *England v Lord Tredegar* (1866) LR 1 Eq 344.

6 *Wright v Lord Maidstone* (1855) 1 K & J 701.

A statement in a document may now be proved by the production of a copy, whether or not that document is still in existence: see the Civil Evidence Act 1968 s 8(1); and CIVIL PROCEDURE vol 11 (2009) PARA 816.

## **UPDATE**

### **446 Loss or destruction of instruments**

NOTE 6--Reference to Civil Evidence Act 1968 should be to Civil Evidence Act 1995.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/G. ACCIDENT/(A) Historical Development of the Jurisdiction/447. Loss or destruction of title deeds.

#### **447. Loss or destruction of title deeds.**

As regards lost or destroyed title deeds, equitable remedies were available:

- 17 (1) where the plaintiff<sup>1</sup> was out of possession, and could show that deeds had been destroyed or were concealed by the defendant; in such a case he was put in possession until the defendant produced the deeds<sup>2</sup>;
- 18 (2) where the plaintiff was in possession, but feared future attacks on his title; in such a case he might obtain a decree establishing his possession<sup>3</sup>;
- 19 (3) if there were independent equities calling for the action of the court; in such a case he might sue in equity generally<sup>4</sup>.

1 A 'plaintiff' in civil proceedings is now generally known as a 'claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

2 *R and Lord Hudson v Countess of Arundel and Lord Howard* (1616) Hob 109; *Whitfield v Fausset* (1750) 1 Ves Sen 387 at 392.

3 *Walmsley v Child* (1749) 1 Ves Sen 341; *Dalston v Coatsworth* (1721) 1 P Wms 731.

4 *Dormer v Fortescue* (1744) 3 Atk 124 at 132.

A statement in a document may now be proved by the production of a copy, whether or not that document is still in existence: see the Civil Evidence Act 1968 s 8(1); and CIVIL PROCEDURE vol 11 (2009) PARA 816.

#### **UPDATE**

#### **447 Loss or destruction of title deeds**

NOTE 4--Reference to Civil Evidence Act 1968 should be to Civil Evidence Act 1995.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/G. ACCIDENT/(B) The Limits of Relief/448. Limits of equitable relief.

## (B) THE LIMITS OF RELIEF

### 448. Limits of equitable relief.

Equity does not relieve against contracts which, owing to circumstances which might have been provided against, prove unexpectedly burdensome to one of the parties. In such cases equity follows the law, and acts on the legal effect of the contract<sup>1</sup>. Where the parties have arranged a certain mode, such as arbitration, for settling certain terms of a contract, and the mode fails, the courts have refused to interfere to complete the terms and to make a contract in equity when there is none at law<sup>2</sup>; but the courts have now modified their approach to suit modern conditions and, where the mode is subsidiary and non-essential, the court may, if the machinery which the parties have set up breaks down, substitute other machinery to carry out the main purpose<sup>3</sup>. Except by the operation of proprietary estoppel<sup>4</sup>, there is no equitable relief in case of accidental omission to make a voluntary disposition of property, for example to make a will<sup>5</sup>. In certain cases, however, equity relieves against the defective execution, though not against the non-execution, of a power<sup>6</sup>; and an executor is not charged in equity with the accidental loss of assets<sup>7</sup>.

1 Thus, when demised buildings are destroyed by fire, the rent is not suspended in equity (*Leeds v Cheetham* (1827) 1 Sim 146 at 150); and a fixed coal-mining rent was payable notwithstanding deficiency in the coal (*Mellers v Duke of Devonshire* (1852) 16 Beav 252).

2 *Cooth v Jackson* (1801) 6 Ves 12 at 34; *Blundell v Brettargh* (1810) 17 Ves 232 at 243.

3 *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, [1982] 3 All ER 1, HL; distinguished in *Crest Nicholson (Residential) South Ltd v McAllister* [2002] EWHC 2443 (Ch), [2003] 1 All ER 46.

4 Proprietary estoppel may be used to give effect to a promise to bequeath property notwithstanding that the statutory formalities for making a testamentary disposition have not been complied with: see ESTOPPEL vol 16(2) (Reissue) PARA 1094.

5 *Whitton v Russell* (1739) 1 Atk 448; but see *Ross v Caunters* [1980] Ch 297, [1979] 3 All ER 580; *Walker v Geo H Medlicott & Son (a firm)* [1999] 1 All ER 685, [1999] 1 WLR 727, CA.

6 See POWERS vol 36(2) (Reissue) PARA 359 et seq.

7 *Jones v Lewis* (1751) 2 Ves Sen 240; *Job v Job* (1877) 6 ChD 562. As to the personal representative being exonerated as regards matters done in the regular course of business see *Clough v Bond* (1838) 3 My & Cr 490 at 497. See also EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 795.

## UPDATE

### 448 Limits of equitable relief

NOTE 3--*Crest Nicholson*, cited, reversed on different grounds: [2004] EWCA Civ 410, [2004] 2 All ER 991n.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/H. ACCOUNT/449. Historical development of the remedy of account.

## **H. ACCOUNT**

### **449. Historical development of the remedy of account.**

The facilities afforded by the former Court of Chancery for taking accounts largely contributed to the extension of its jurisdiction. Where there was a liability to account, either by virtue of a legal relation, as guardian in socage, or of contract, as bailiff or receiver, an action of account lay at law<sup>1</sup>; but it was dilatory and troublesome and fell into disuse<sup>2</sup>. Apart from this special form of action, matters of account arising on contract might be determined in an action of assumpsit for the balance due<sup>3</sup>, but this was impracticable if the accounts were too complicated for a jury. In equitable matters the Court of Chancery took any necessary accounts<sup>4</sup>, and for the sake of affording a more adequate remedy it assumed a concurrent jurisdiction in common law matters<sup>5</sup>. Where, however, the claim was a legal one, the mere fact that an account was requested did not justify the plaintiff in filing a bill in equity; and, even though he had to come into equity for discovery, it did not follow that equity would also take the account<sup>6</sup>. Where an action involving an account had already been commenced at law, it was not restrained at the instance of the defendant unless there were strong considerations of convenience in favour of taking the account in equity<sup>7</sup>. An action was not withdrawn from a court of law merely because it might originally have been commenced in equity<sup>8</sup>.

The principle on which the Court of Chancery acted was that jurisdiction would not be exercised where the matter could be as fully and conveniently dealt with by a court of common law<sup>9</sup>.

1 Co Litt 89b, 172a; *Earl of Devonshire's Case* (1607) 11 Co Rep 89a. See now CIVIL PROCEDURE vol 12 (2009) PARA 1524 et seq; and as to guardians, and their liability to account, see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 149. As to the former Court of Chancery see PARAS 401-403 ante.

2 Lee, Dictionary of Practice (2nd Edn) 8; Bac Abr, Accompt. 'The writ of account at common law did not exclude, but rather was superseded by, the jurisdiction of the courts of equity on this subject; because the proceeding in equity was found to be the more convenient mode of calling parties to an account--partly on account of the difficulty attending the process under the old writ of account, but chiefly from the advantage of compelling the party to account upon oath, according to the practice of courts of equity': *A-G v Dublin Corp'n* (1827) 1 Bli NS 312 at 337, HL, per Lord Redesdale; and see *Ex p Bax* (1751) 2 Ves Sen 388 at 389.

3 *Tomkins v Willshear* (1814) 5 Taunt 431 at 432.

4 See Story, Equity Jurisprudence s 45 and the statement of the equitable jurisdiction in account in the judgment of Lindley LJ in *London, Chatham and Dover Rly Co v South Eastern Rly Co* [1892] 1 Ch 120 at 140, CA.

5 *Carlisle Corp'n v Wilson* (1807) 13 Ves 276 at 278-279.

6 There was at one time a strong tendency to make the account in equity consequential on discovery (*Barker v Dacie* (1802) 6 Ves 681 at 688; *Adley v Whistable Co* (1810) 17 Ves 315 at 324; *Mackenzie v Johnston* (1819) 4 Madd 373); but this did not prevail (*Foley v Hill* (1848) 2 HL Cas 28 at 37, 42; *Phillips v Phillips* (1852) 9 Hare 471; cf *Pearce v Creswick* (1843) 2 Hare 286 at 293). In addition to the right of discovery, there must have been some special reason of convenience in taking the account in equity: *Shepard v Brown* (1863) 4 Giff 208. Discovery is now known as 'disclosure': see CIVIL PROCEDURE vol 11 (2009) PARA 538 et seq.

7 *North Eastern Rly Co v Martin* (1848) 2 Ph 758; and see *Martin v Powning* (1869) 4 Ch App 356 at 370; *Southampton Dock Co v Southampton Harbour and Pier Board* (1870) LR 11 Eq 254; subsequent proceedings (1872) LR 14 Eq 595.

8     *South Eastern Rly Co v Brogden* (1850) 3 Mac & G 8.

9     *Foley v Hill* (1848) 2 HL Cas 28; *Dinwiddie v Bailey* (1801) 6 Ves 136; *Lord Courteney v Godschall* (1804) 9 Ves 473; *Ambrose v Dunmow Union* (1846) 9 Beav 508; *Phillips v Phillips* (1852) 9 Hare 471; *Padwick v Hurst* (1854) 18 Beav 575; *Smith v Leveaux* (1863) 2 De GJ & Sm 1; *Harrington v Churchward* (1860) 6 Jur NS 576; *Shepard v Brown* (1863) 4 Giff 208; *Flockton v Peake* (1864) 3 New Rep 453; affd 10 LT 173; *Dabbs v Nugent* (1865) 11 Jur NS 943; *Southampton Dock Co v Southampton Harbour and Pier Board* (1870) LR 11 Eq 254; subsequent proceedings (1872) LR 14 Eq 595.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/H. ACCOUNT/450. Accounts after the fusion of the administration of the courts of law and equity.

#### **450. Accounts after the fusion of the administration of the courts of law and equity.**

In the High Court, the taking of accounts generally is assigned to the Chancery Division<sup>1</sup> but in proper cases may be ordered to be taken in the Queen's Bench Division<sup>2</sup>. In complex cases a claim for an account may usefully be transferred to the Technology and Construction Court<sup>3</sup>. The Civil Procedure Rules ('CPR') provide for applications for summary judgment where the claim includes a claim for an account<sup>4</sup> and in relation to an interim order to prepare and file accounts<sup>5</sup>.

Where the court orders any account to be taken it may, by the same or a subsequent order, give directions as to the manner in which the account is to be taken and verified<sup>6</sup>. In particular it may direct that in taking an account the relevant books of account are to be evidence of their contents but that any party may take such objections to the accounts as he may think fit<sup>7</sup>. Any party may apply to the court<sup>8</sup> for directions as to the taking of an account or for variation in directions already made<sup>9</sup>.

A claim for an account in equity, absent any trust, has no equitable element; it is based on legal, not equitable rights. Thus a claim for an account brought by a principal against his agent is barred by the statutes of limitation unless the agent is more than a mere agent but is a trustee of the money which he received<sup>10</sup>.

1 See the Supreme Court Act 1981 s 61(1), Sch 1 para 1(f); para 496 post at head (6) in the text; and COURTS vol 10 (Reissue) PARA 611.

2 *York v Stowers* [1883] WN 174.

3 As to the Technology and Construction Court ('TCC'), which replaced the Official Referees' Court in 1998, see COURTS vol 10 (Reissue) PARA 616; and as to procedure in the TCC see CPR Pt 60; *Practice Direction--Technology and Construction Court Claims* PD 60; and CIVIL PROCEDURE vol 12 (2009) PARA 1546.

4 See *Practice Direction--the Summary Disposal of Claims* PD 24 para 6; and CIVIL PROCEDURE vol 12 (2009) PARA 315.

5 See CPR 25.1(n); and CIVIL PROCEDURE vol 12 (2009) PARA 1525.

6 See *Practice Direction--Accounts, Inquiries etc* PD 40A para 1.1; and CIVIL PROCEDURE vol 12 (2009) PARA 1526. As to an account of profits see *My Kinda Town Ltd v Soll and Grunts Investments* [1983] RPC 407, CA.

7 See *Practice Direction--Accounts, Inquiries etc* PD 40A para 1.2; and CIVIL PROCEDURE vol 12 (2009) PARA 1526.

8 I.e. in accordance with CPR Pt 23; see CIVIL PROCEDURE vol 11 (2009) PARA 305 et seq.

9 See *Practice Direction--Accounts, Inquiries etc* PD 40A para 1.3; and CIVIL PROCEDURE vol 12 (2009) PARA 1526.

10 *Paragon Finance plc v DB Thakarer & Co (a firm)* [1999] 1 All ER 400, CA; and see *Coulthard v Disco Mix Club Ltd* [1999] 2 All ER 457, [2000] 1 WLR 707; *Cia de Seguros Imperio (a body corporate) v Heath (REBX) Ltd (formerly CE Heath & Co (North America) Ltd)* [2000] 2 All ER (Comm) 787, [2001] 1 WLR 112, CA.

#### **UPDATE**

**450 Accounts after the fusion of the administration of the courts of law and equity**

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/H. ACCOUNT/451. Account on the footing of wilful default.

#### **451. Account on the footing of wilful default.**

An account on the footing of wilful default<sup>1</sup> is taken so as to charge the accounting party not only with what he has actually received but also with what, but for his wilful default, he might have received<sup>2</sup>. Except where an account is sought against a mortgagee in possession<sup>3</sup>, a claimant, in order to obtain an account on the footing of wilful default, must prove at least one act of wilful default or at any rate show a case for inquiry<sup>4</sup>; and he must generally be ready to prove his allegations at the hearing in court<sup>5</sup>. An account on this footing may be ordered at any stage of the proceedings, even on evidence adduced after judgment has been given, if wilful default is alleged in the pleadings<sup>6</sup>. If wilful default was not originally pleaded, it may be introduced by amendment at any stage of the proceedings at which amendments may be made, that is to say, before judgment<sup>7</sup>. It is not competent to a remainderman to institute proceedings for relief against wilful default in respect of the prior life estate unless the tenant for life is a party, since the remainderman has an interest in the capital only and not in the income<sup>8</sup>.

In exercising its discretion whether or not a general account on the footing of wilful default should be ordered, the court will take into account a frank admission by defaulting trustees of an act of wilful default; but the test then seems to be whether the past conduct of the trustees is such as to give rise *prima facie* to a reasonable inference that other breaches of trust not yet known to the claimant or the court have occurred<sup>9</sup>.

The Civil Procedure Rules ('CPR') provide that a claim for an account must contain details of any wilful default on which the claimant wishes to rely<sup>10</sup>.

1 For a discussion of the meaning of wilful default see *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 at 430-441, CA, per Romer J and at 523-525 per Warrington LJ. For these purposes, wilful default by a trustee means a passive breach of trust, an omission by a trustee to do something which, as a prudent trustee, he ought to have done, as distinct from an active breach of trust, that is to say, doing something which the trustee ought not to have done: *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515 at 546, [1980] 2 All ER 92 at 97 per Brightman LJ.

2 Thus eg a mortgagee of a public house who takes possession and lets it subject to a covenant to take only the mortgagee's own beers will be accountable not for the rent he actually obtains but for the higher rent he might have obtained had he let the house without restriction as to the purchase of beer: *White v City of London Brewery Co* (1889) 42 ChD 237, CA. See *Coulthard v Disco Mix Club Ltd* [1999] 2 All ER 457 at 481-482, [2000] 1 WLR 707 at 733-734.

3 Accounts against a mortgagee in possession may be taken on the footing of wilful default, even though wilful default is not pleaded or proved: see *Mayer v Murray* (1878) 8 ChD 424; *White v City of London Brewery* (1889) 42 ChD 237, CA; and MORTGAGE vol 77 (2010) PARA 428.

4 *Sleight v Lawson* (1857) 3 K & J 292; *Re Youngs*, *Doggett v Revett* (1885) 30 ChD 421 at 431, CA; *Re Wrightson*, *Wrightson v Cooke* [1908] 1 Ch 789 at 800. Cf *Re Wells*, *Wells v Wells* [1962] 2 All ER 826, [1962] 1 WLR 874, CA.

5 *Re Armitage*, *Smith v Armitage* (1883) 24 ChD 727.

6 *Job v Job* (1877) 6 ChD 562; *Mayer v Murray* (1878) 8 ChD 424; *Re Symons*, *Luke v Tonkin* (1882) 21 ChD 757 at 761; and see *Laming v Gee* (1878) 10 ChD 715; *Barber v Mackrell* (1879) 12 ChD 534 at 538-539, CA, per Fry J. In this respect a claim for an account on the footing of wilful default differs from a claim in respect of active breaches of trust; in the latter case the claimant is entitled to relief in respect only of such breaches as

he establishes at the trial: *Re Wrightson, Wrightson v Cooke* [1908] 1 Ch 789 at 800; and see TRUSTS vol 48 (2007 Reissue) PARA 1074. Compound interest may be charged on balances in a proper case, even though wilful default is nowhere alleged: see *Re Barclay, Barclay v Andrew* [1899] 1 Ch 674 at 681, where Stirling J, citing *Re Symons, Luke v Tonkin* supra and *Re Armitage, Smith v Armitage* (1883) 24 ChD 727, said that the rule as to the necessity of pleading wilful default had perhaps been relaxed a little. See now, however, the text and note 10 infra.

7 *Mayer v Murray* (1878) 8 ChD 424; *Re Symons, Luke v Tonkin* (1882) 21 ChD 757; and see *Barber v Mackrell* (1878) 12 ChD 534, CA.

8 *Whitney v Smith* (1869) 4 Ch App 513. Subject to certain exceptions, no settlement created on or after 1 January 1997 is a settlement for the purposes of the Settled Land Act 1925: see the Trusts of Land and Appointment of Trustees Act 1996 ss 2, 27; and REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS.

9 *Wildes v Dudlow* [1870] WN 231; *Re Tebbs, Redfern v Tebbs* [1976] 2 All ER 858, [1976] 1 WLR 924.

10 See *Practice Direction--Statements of Case* PD 16 para 8.2(7).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/H. ACCOUNT/452. Settled accounts.

## 452. Settled accounts.

Settled accounts are accounts which have been agreed between the parties. They may be relied upon by way of defence against an alleged obligation to account or to account further<sup>1</sup>. A mere statement by one party to the other of how an account stands cannot amount to a settled account; the other party must agree that it is right<sup>2</sup>. Signing the account is not necessary to constitute a settled account, nor is the delivery up of vouchers at the time the account is settled<sup>3</sup>; but the account should be in writing and show what the balance is<sup>4</sup>. The theory of settled accounts is properly applicable to cases of mutual debits and credits only and not to cases where one party has to do all the accounting<sup>5</sup>. An account which is merely rendered by one party is not conclusive between the parties; and either party is at liberty to challenge particular items charged against him, on grounds which would have entitled him to repayment if the items so charged had been paid by him<sup>6</sup>.

1 *Darthez Bros v Lee and Sama* (1836) 2 Y & C Ex 5; *Newen v Wetten* (1862) 31 Beav 315; *Phillips-Higgins v Harper* [1954] 1 QB 411, [1954] 1 All ER 116; affd [1954] 1 QB 411 at 420, [1954] 2 All ER 51n, CA (where, however, the plea did not succeed). Settled accounts are sometimes referred to as accounts stated, but it seems preferable to reserve that term for the cause of action of that description (see CONTRACT vol 9(1) (Reissue) PARA 1049). As a settled account is a defence to a claim for an account, an order directing accounts between parties on a wider basis may contain a direction that settled accounts are not to be disturbed.

2 *Phillips-Higgins v Harper* [1954] 1 QB 411, [1954] 1 All ER 116; affd [1954] 1 QB 411 at 420, [1954] 2 All ER 51n, CA. The mere fact of delivery of the account does not afford sufficient legal presumption that the account was settled: *Irvine v Young* (1823) 1 Sim & St 333. An account stated with a minor was formerly void (see the Infants Relief Act 1874 s 1 (repealed)) but now the basic common law principles apply (see the Minors' Contracts Act 1987; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 14 et seq). A reservation of 'errors excepted' does not prevent an account from being a settled account: *Johnson v Curtis* (1791) 3 Bro CC 266. As to a settled account with one of two or more personal representatives see *Fountain Forestry Ltd v Edwards* [1975] Ch 1, [1974] 2 All ER 280.

3 *Willis v Jernegan* (1741) 2 Atk 251 at 252 per Lord Hardwicke LC; *Yourell v Hibernian Bank Ltd* [1918] AC 372 at 391, HL, per Lord Atkinson.

4 *Burk v Brown* (1742) 2 Atk 397 at 399 per Lord Hardwicke LC. An oral agreement may, however, have much the same effect as a written document: *Phillips-Higgins v Harper* as reported in [1954] 1 All ER 116 at 117 per Pearson J; affd on another point [1954] 1 QB 411 at 420, [1954] 2 All ER 51n, CA.

5 *Anglo-American Asphalt Co v Crowley Russell & Co Ltd* [1945] 2 All ER 324; cf *Hunter v Belcher* (1864) 2 De GJ & Sm 194, CA. There may be a so-called account stated which is unilateral; this is arrived at where a claim to payment made by one party is admitted by the other party to be correct, but a real account stated contains items both of credit and debit and the figures on both sides are adjusted between the parties and a balance struck: *Laycock v Pickles* (1863) 4 B & S 497; *Camillo Tanks Steamship Co Ltd v Alexandria Engineering Works* (1921) 38 TLR 134 at 143, HL, per Lord Cave; approved in *Siqueira v Noronha* [1934] AC 332, PC; *Trading & General Investment Corp v Gault Armstrong & Kemble Ltd, The Okeanis* [1986] 1 Lloyd's Rep 195. See AGENCY vol 1 (2008) PARA 87.

6 *Rose v Savory* (1835) 2 Bing NC 145; *Hunter v Belcher* (1863) 9 LT 501; on appeal (1864) 2 De GJ & Sm 194, CA (account rendered and not objected to). An account stated which is unilateral (see note 5 supra), although a distinct cause of action, is not conclusive and establishes only a prima facie liability: *Camillo Tank Steamship Co Ltd v Alexandria Engineering Works* (1921) 38 TLR 134 at 137, 141, HL. An account stated containing cross items, in which a balance is struck after items on either side have been set off, the consideration for payment of the balance being the discharge of the items on each side, can be invalidated only in respect of such items as, if they had been actually paid, would have been recoverable as on a failure of consideration (*Laycock v Pickles* (1863) 4 B & S 497 at 506 per Blackburn J; *Siqueira v Noronha* [1934] AC 332,

PC), or on the ground of fraud or common error or something similar (*Camillo Tank Steamship Co Ltd v Alexandria Engineering Works* *supra*).



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/H. ACCOUNT/453. Reopening a settled account.

### 453. Reopening a settled account.

In certain cases a settled account will be reopened<sup>1</sup> on the ground of mistake, as where accounts are drawn up and assented to by parties under a common mistake as to their rights and obligations<sup>2</sup>, or where by mistake too little has been accepted<sup>3</sup> or too much admitted<sup>4</sup>. The court will also order a settled account to be reopened for fraud<sup>5</sup>, even in respect of a single fraudulent item<sup>6</sup>, and may do so after the account has been closed a considerable time in the case of persons occupying the position of principal and agent or trustee and beneficiary<sup>7</sup>.

In the absence of fraud, a settled account will be reopened if serious errors<sup>8</sup> or errors to a considerable extent in amount and in the number of the items are shown<sup>9</sup>; or if the account is erroneous, even if in respect of one item only, and from the relative situations of the parties, or the manner in which the settlement took place, or the nature of the error proved, it appears that the settlement ought not to be taken advantage of by the accounting party<sup>10</sup>. Thus, where there is a fiduciary relationship between the parties, such as that of solicitor and client<sup>11</sup>, the account will be reopened more readily and on proof of smaller errors than in cases where there is no such relationship<sup>12</sup>. Undue influence may be the principal ground for reopening a settled account where the relationship between the parties is that of solicitor and client<sup>13</sup>.

The court may reopen a settled account in the case of an extortionate credit bargain under the Consumer Credit Act 1974<sup>14</sup>.

1 This, in effect, means set aside, for the result is that the whole may be reconsidered or new accounts may be taken.

2 *Thomas v Hawkes* (1841) 8 M & W 140; *Pritt v Clay* (1843) 6 Beav 503; *Daniell v Sinclair* (1881) 6 App Cas 181 at 191, PC; and see *Re Bayley-Worthington and Cohen's Contract* [1909] 1 Ch 648 at 666 per Parker J.

3 *Perry v Attwood* (1856) 6 E & B 691 (account pleaded by way of defence); *Stainton v Carron Co* (1857) 24 Beav 346; *Dails v Lloyd* (1848) 12 QB 531.

4 *Thomas v Hawkes* (1841) 8 M & W 140; *Dails v Lloyd* (1848) 12 QB 531; *Miller v Douglas* (1886) 56 LJ Ch 91; and see *Vagliano Bros v Governor & Co of Bank of England* (1888) 22 QBD 103 at 127; revsd on other grounds sub nom *Bank of England v Vagliano Bros* [1891] AC 107, HL.

5 *Vernon v Vawdry* (1740) 2 Atk 119; *Wharton v May* (1799) 5 Ves 27; *Drew v Power* (1803) 1 Sch & Lef 182 at 192; *Chambers v Goldwin* (1804) 9 Ves 254 at 265; *Allfrey v Allfrey* (1849) 1 Mac & G 87. The court will also order a settled account to be opened for fraud if an agent's account is founded on untrue statements, even if alleged to be beneficial to the principal: *Clarke v Tipping* (1846) 9 Beav 284; *Oldaker v Lavender* (1833) 6 Sim 239.

6 *Allfrey v Allfrey* (1849) 1 Mac & G 87, followed in *Williamson v Barbour* (1877) 9 ChD 529 at 533 per Jessel MR and in *Gething v Keighley* (1878) 9 ChD 547 at 550 per Jessel MR; and see *Laimond Property Investment Co Ltd v Arlington Park Mansions Ltd* [1989] 1 EGLR 208, CA; and PARTNERSHIP vol 79 (2008) PARA 154.

7 *Vernon v Vawdry* (1740) 2 Atk 119; *Beaumont v Boulton* (1802) 7 Ves 599; *Earl of Hardwicke v Vernon* (1808) 14 Ves 504; *Walsham v Stainton* (1863) 1 De GJ & Sm 678; *Williamson v Barbour* (1877) 9 ChD 529.

8 *Phillips-Higgins v Harper* as reported in [1954] 1 All ER 116 at 118 per Pearson J; affd on another point [1954] 1 QB 411 at 420, [1954] 2 All ER 51n, CA.

9 *Williamson v Barbour* (1877) 9 ChD 529.

10 *Coleman v Mellersh* (1850) 2 Mac & G 309 at 314 per Lord Cottenham LC; *Re Webb, Lambert v Still* [1894] 1 Ch 73 at 84, CA, per Davey LJ; and see *Davis v Richards & Wallington Industries Ltd* [1991] 2 All ER 563, [1990] 1 WLR 1511.

11 *Lewes v Morgan* (1817) 5 Price 42, HL; *Lawless v Mansfield* (1841) 1 Dr & War 557; *Cheese v Keen* [1908] 1 Ch 245.

12 *Lewes v Morgan* (1817) 5 Price 42, HL; *Lawless v Mansfield* (1841) 1 Dr & War 557; *Coleman v Mellersh* (1850) 2 Mac & G 309 at 314 per Lord Cottenham LC; *Williamson v Barbour* (1877) 9 ChD 529; *Re Webb, Lambert v Still* [1894] 1 Ch 73 at 84, CA, per Davey LJ; *Cheese v Keen* [1908] 1 Ch 245. In foreclosure the mortgagor may, against a solicitor-mortgagee, raise this objection to a settled account by way of equitable defence: *Eyre v Hughes* (1876) 2 ChD 148.

13 *Watson v Rodwell* (1878-79) 11 ChD 150, CA; *Ward v Sharp* (1884) 53 LJ Ch 313. An account settled between solicitor and client will not be reopened on a general allegation of error unless admitted by the solicitor (*Matthews v Wallwyn* (1798) 4 Ves 118 at 125); there must either be special circumstances showing that the account ought to be opened, or allegation and proof of particular errors (*Waters v Taylor* (1837) 2 My & Cr 526 at 555, 557 per Lord Cottenham LC; *Lawless v Mansfield* (1841) 1 Dr & War 557 at 605, treated in *Blagrove v Routh* (1856) 2 K & J 509 at 517 (on appeal 8 De GM & G 620 at 632) as going too far, but explained in *Morgan v Higgins* (1859) 1 Giff 270 at 277; and see *Matthews v Wallwyn* supra). Where the relation of solicitor and client exists, the relief may not be limited to six years. As to the relation of solicitor and client see generally LEGAL PROFESSIONS vol 66 (2009) PARA 763 et seq.

14 See the Consumer Credit Act 1974 ss 137-140 (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARAS 109, 269-270.

## UPDATE

### 453 Reopening a settled account

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/H. ACCOUNT/454. Making objections to an account (formerly 'liberty to surcharge and falsify').

#### **454. Making objections to an account (formerly 'liberty to surcharge and falsify').**

The Civil Procedure Rules ('CPR') do not use the terms 'surcharge' and 'falsify' but there are provisions for making objections to an account. The earlier cases held that without wholly reopening a settled account the court might grant liberty to surcharge and falsify<sup>1</sup> if this would meet the justice of the case<sup>2</sup>. If a single definite error was proved, liberty to surcharge and falsify would be given<sup>3</sup>, since the discovery of one error implied that others might be found<sup>4</sup>. Where there had been a long lapse of time and loss of books and documents, the court might decline to open the accounts altogether and give liberty to surcharge and falsify only, notwithstanding that numerous and important errors in the account were proved<sup>5</sup>.

Under the CPR any party who wishes to contend:

- 20 (1) that an accounting party has received more than the amount shown by the account to have been received; or
- 21 (2) that the accounting party should be treated as having received more than he has actually received; or
- 22 (3) that any item in the account is erroneous in respect of amount; or
- 23 (4) that in any other respect the account is inaccurate,

must, unless the court directs otherwise, give written notice to the accounting party of his objections<sup>6</sup>.

1 'If any of the parties can show an omission for which credit ought to be given, that is a surcharge; or, if anything is inserted that is a wrong charge, he is at liberty to show it, and that is falsification; but that must be by proof on his side': *Pit v Cholmondeley* (1754) 2 Ves Sen 565 at 566 per Lord Hardwicke LC. However, an accounting party, having pleaded that his accounts were settled, could not, where leave to surcharge and falsify was given, insert items in his own favour: see *Mozeley (Mozley) v Cowie* (1877) 47 LJ Ch 271.

2 *Cheese v Keen* [1908] 1 Ch 245.

3 *Vernon v Vawdry* (1740) 2 Atk 119; *Chambers v Goldwin* (1804) 9 Ves 254 at 265; *Davies v Spurling* (1829) Tam 199; *Parkinson v Hanbury* (1867) LR 2 HL 1 at 19; *Gething v Keighley* (1878) 9 ChD 547 at 550; *Laimond Property Investment Co Ltd v Arlington Park Mansions Ltd* [1989] 1 EGLR 208, CA. Instances are where a charge by the mortgagee for commission on consignments (*Chambers v Goldwin* (1801) 5 Ves 834 at 837; on appeal (1804) 9 Ves 254), or for personally collecting rents (*Langstaffe v Fenwick, Fenwick v Langstaffe* (1805) 10 Ves 405), had been made; or compound interest had been charged without authority (*Daniell v Sinclair* (1881) 6 App Cas 181, PC); cf *Cheese v Keen* [1908] 1 Ch 245 at 251 (a solicitor-mortgagee's account contained overcharges of interest and also profit costs which he was not entitled to charge). In such cases it was immaterial whether the mistake was of fact or of law: *Langstaffe v Fenwick, Fenwick v Langstaffe* supra; *Daniell v Sinclair* supra at 190; cf *Roberts v Kuffin* (1741) 2 Atk 112 per Lord Hardwicke LC. Where no settled account was proved, but it was suggested that one might exist, liberty would be given to surcharge and falsify, if such should be the case, without allegation of specific errors: *Kinsman v Barker* (1808) 14 Ves 579; *Lawless v Mansfield* (1841) 1 Dr & War 557 at 604. If, however, a settled account was proved and no error shown, the court would not interfere: *Endo v Caleham* (1831) You 306; *Lawless v Mansfield* supra at 605.

4 *Coleman v Mellersh* (1850) 2 Mac & G 309 at 314 per Lord Cottenham LC; *Re Webb, Lambert v Still* [1894] 1 Ch 73 at 84, CA, per Davey LJ.

5 *Brownell v Brownell* (1786) 2 Bro CC 62; *Millar v Craig* (1843) 6 Beav 433. Liberty to surcharge and falsify would be given after a lapse of many years where there was a relationship of confidence between the parties, such as that of solicitor and client: *Jones v Moffett* (1846) 3 Jo & Lat 636.

6 *Practice Direction--Accounts, Inquiries etc* PD 40A para 3.1. As to the contents of the notice see PARAS 3.2, 3.3; and see CIVIL PROCEDURE vol 12 (2009) PARA 1526.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/H. ACCOUNT/455. Allowances.

## 455. Allowances.

In taking any account directed by any judgment or order, all just allowances must be made without any express direction to that effect<sup>1</sup>. What are just allowances depends very much upon the circumstances of each case. In the ordinary course the question of what are just allowances is left to be decided on the taking of the account<sup>2</sup>.

It has long been the law and is now the statutory rule that an executor or administrator is allowed all reasonable expenses which have been incurred in the conduct of his office, except those which arise from his own default, and a trustee is in the same position<sup>3</sup>. In matters arising in the ordinary business of the trust and in the absence of special provision, it was held that a solicitor-trustee could charge only his costs out of pocket, and not profit costs<sup>4</sup>.

The Trustee Act 2000 contains new provisions relating to the remuneration of a professional trustee. Where there is a charging clause in the trust instrument any payments to which the trustee is entitled thereunder in respect of services are to be treated<sup>5</sup> as remuneration for services and not a gift, reversing the previous law<sup>6</sup>. Further, in the absence of any provision about entitlement to remuneration in the trust instrument a professional trustee may be entitled to reasonable remuneration for any services that he provides to or on behalf of the trust<sup>7</sup>. These provisions are made applicable to personal representatives administering an estate according to the law as they apply to a trustee carrying out a trust for beneficiaries<sup>8</sup>.

1 *Practice Direction--Accounts, Inquiries etc* PD 40A para 4; and see CIVIL PROCEDURE vol 12 (2009) PARA 1526.

2 *Brown v De Taster* (1819) Jac 284 at 294.

3 A trustee may reimburse himself from the trust funds or pay out of the trust funds expenses properly incurred by him when acting on behalf of the trust: see the Trustee Act 2000 s 31(1); and TRUSTS vol 48 (2007 Reissue) PARA 902. Section 31 is applied to personal representatives by s 35: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 5. 'Where a trustee in the fair execution of his trust has expended money by reasonably and properly taking opinions and procuring directions, he is entitled not only to the costs, but also to his charges and expenses, under the head of just allowances': *Fearn v Young* (1804) 10 Ves 184 per Lord Eldon LC. A trustee accountable for the profits of a business carried on by him is so accountable subject to all just allowances for his time, energy and skill: *Re Jarvis, Edge v Jarvis* [1958] 2 All ER 336, [1958] 1 WLR 815. The right of a trustee to be indemnified out of the trust fund for money expended by him in its preservation is strictly limited to the trust fund: *Re Earl of Winchelsea's Policy Trusts* (1888) 39 ChD 168. Where, however, a beneficiary is of full age and capacity (*sui juris*) and absolutely entitled to a trust fund, he may in certain circumstances be rendered personally liable to indemnify the trustee: *Hardoon v Belilios* [1901] AC 118, PC; and see TRUSTS vol 48 (2007 Reissue) PARA 902.

4 *Re Barber, Burgess v Vinicombe* (1886) 34 ChD 77; *Re Corsellis, Lawton v Elwes* (1887) 34 ChD 675, CA; *Re Gallard, ex p Gallard* [1896] 1 QB 68, CA; and see LEGAL PROFESSIONS vol 66 (2009) PARAS 811-812.

5 *Ie* for the purposes of the Wills Act 1837 s 15 and the Administration of Estates Act 1925 s 34(3): Trustee Act 2000 s 28(4).

6 *Ibid* s 28(4). See TRUSTS vol 48 (2007 Reissue) PARA 931.

7 See *ibid* s 29, which does not apply to the trustee of a charitable trust (s 29(1)(b), (2)(b)) and contains qualifications applying to an individual which do not apply to a trust corporation (s 29(2)). See further TRUSTS vol 48 (2007 Reissue) PARA 932.

8 See *ibid* s 35; and EXECUTORS AND ADMINISTRATORS.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/I. APPORTIONMENT/456. Apportionment in respect of time.

## **I. APPORTIONMENT**

### **456. Apportionment in respect of time.**

The general rule of the common law was to refuse to recognise the possibility of apportionment in respect of time, whether of contracts and payments under them, or of rent, interest and annuities. In this respect equity followed the law, venturing to differ only on some minor points. A contract is usually indivisible<sup>1</sup>. Payment under it is not due until the service which earns the payment has been entirely performed, but, when a payment has already been made, a part of it cannot be recovered because the contract has not been wholly performed; and, where there is no apportionment of such payments at law, there is none in equity<sup>2</sup>.

At law interest accrued from day to day and was therefore apportionable<sup>3</sup>, but rents and annuities and other periodical payments were not<sup>4</sup>, and therefore were not in equity. Where, therefore, a landlord, whose estate determined with his life, died between two rent days, his executors were not entitled to any rent and, since the lease was at an end, the tenant was not bound to pay any<sup>5</sup>; but, if he held until the next rent day and then paid the whole rent to the successor, the latter was bound in equity to account for a proportionate part to the landlord's executors<sup>6</sup>. Although annuities and dividends were not in general apportionable<sup>7</sup>, an exception was made in equity where they were given for the maintenance of a minor<sup>8</sup> or of a married woman living apart from her husband<sup>9</sup>.

Rents, annuities and other periodical payments are now apportionable by statute<sup>10</sup>.

1 See CONTRACT vol 9(1) (Reissue) PARAS 627, 922.

2 At one time it was considered that apprenticeship premiums could be apportioned, and a part recovered on the master's death during the term (*Hirst v Tolson* (1850) 2 Mac & G 134); but there was no debt in such a case either at law (*Whincup v Hughes* (1871) LR 6 CP 78) or in equity (*Ferns v Carr* (1885) 28 ChD 409). The master's bankruptcy was treated as a case of accident, and a part of the premium was recoverable in equity: *Hale v Webb* (1786) 2 Bro CC 78 at 80; *Ex p Sandby* (1745) 1 Atk 149; and see the Insolvency Act 1986 s 348; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 695. As to the adjustment of rights and liabilities of parties to frustrated contracts see the Law Reform (Frustrated Contracts) Act 1943 s 1; and CONTRACT vol 9(1) (Reissue) PARA 913 et seq.

3 As to interest on mortgages see *Edwards v Countess of Warwick* (1723) 2 P Wms 171 at 176; *Pearly v Smith* (1745) 3 Atk 260; *Wilson v Harman* (1755) 2 Ves Sen 672; and as to interest on bonds see *Banner v Lowe* (1806) 13 Ves 135.

4 *Clun's Case* (1613) 10 Co Rep 127a (rents). As to annuities and other periodical payments see *Re Smyth, ex p Smyth* (1818) 1 Swan 337 and the cases cited in the note thereto.

5 *Jenner v Morgan* (1717) 1 P Wms 392; but, under the Distress for Rent Act 1737 s 15 (repealed), the executors of the tenant for life were entitled to a proportion of the rent. As to the equitable extension of the statute to tenants in tail see *Paget v Gee* (1753) Amb 198, 807; *Vernon v Vernon* (1789) 2 Bro CC 659 at 662; and as to leases of tithes see *Bentham v Alston* (1690) 2 Vern 204 at 205.

6 *Paget v Gee* (1753) Amb 198, 807.

7 *Pearly v Smith* (1745) 3 Atk 260; *Sherrard v Sherrard* (1747) 3 Atk 502.

8 *Hay v Palmer* (1728) 2 P Wms 501; *Sheppard v Wilson* (1845) 4 Hare 392 at 395.

9     *Howell v Hanforth* (1775) 2 Wm Bl 1016; *Anderson v Dwyer* (1804) 1 Sch & Lef 301.

10    See the Apportionment Act 1870; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 278;  
RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 839 et seq.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/I. APPORTIONMENT/457. Apportionment in respect of estate.

#### **457. Apportionment in respect of estate.**

Although not apportionable in respect of time, rent was in some cases apportionable at law in respect of estate, for example on the lawful eviction of the tenant from part of the land<sup>1</sup>; and apparently an interference with enjoyment, without actual eviction, was a ground for apportionment in equity, as where a right of common was established on part of the land<sup>2</sup>. Rent service was apportionable upon a severance of the reversion, whether by act of the parties or of law<sup>3</sup>.

A rentcharge, however, although apportionable if part of the land vested in the owner of the rentcharge by act of law, was not apportionable, but was extinguished at law if part of the land was purchased by the owner of the rentcharge<sup>4</sup>. In equity, however, the rentcharge was also apportioned in this latter case<sup>5</sup>.

Rentcharges are now apportionable by statute<sup>6</sup>.

1 *Smith v Malings* (1608) Cro Jac 160; and see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 279.

2 *Jew (or Tew) v Thackwell (or Thirkwell)* (1663) 3 Rep Ch 7 at 11, Freem Ch 174. A subsequent diminution in the value of the premises was, however, no ground for reducing the rent: *Duckenfield v Whichcott* (1674) 2 Cas in Ch 204.

3 Littleton's Tenures s 222; Co Litt 148a; *Collins and Hardings's Case* (1597) 13 Co Rep 57; *Salts v Battersby* [1910] 2 KB 155.

4 Co Litt 148a.

5 *Slater v Buck* (1730) Mos 256; and see *Anon v Hawkes* (1676) 1 Cas in Ch 273. Extinguishment of rights by acceptance of an estate was not allowed in equity: *Elliot v Hancock* (1690) 2 Vern 143.

6 As to the general statutory power of apportionment see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 844 et seq; and as to equitable apportionment see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 849 et seq.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/J. CONTRIBUTION/458. Nature of contribution.

## **J. CONTRIBUTION**

### **458. Nature of contribution.**

Although its extent may be modified by contract<sup>1</sup>, contribution<sup>2</sup> is not based on contract, but on principles of natural justice<sup>3</sup>. Payment by one person liable releases the others from the principal demand, and they are required to contribute as a return for this benefit; but the principle does not apply unless all the parties are liable to a common demand, and such liability, therefore, is a condition of contribution<sup>4</sup>. As between the principal debtor liable under a bond and a surety, the surety, on paying the debt, became in equity, as at law, only a simple contract creditor of the principal<sup>5</sup> unless he procured an assignment of the bond<sup>6</sup>. In matters of contribution equity exercised jurisdiction concurrent with that at law<sup>7</sup>, but the procedure in equity was more convenient and extensive<sup>8</sup>.

1 *Swain v Wall* (1641) 1 Rep Ch 149; *Dering v Earl of Winchelsea* (1787) 1 Cox Eq Cas 318; *Craythorne v Swinburne* (1807) 14 Ves 160; *Scholefield Goodman & Sons Ltd v Zyngier*[1986] AC 562, [1985] 3 All ER 105, PC. Cf *Firma C-Trade SA v Newcastle Protection and Indemnity Association, The Fanti, Socony Mobil Oil Co Inc v West of England Ship Owners Mutual Insurance Association (London) Ltd, The Padre Island*[1991] 2 AC 1, [1990] 2 All ER 705, HL; *Stimpson v Smith*[1999] Ch 340, [1999] 2 All ER 833, CA; *Hampton v Minns*[2002] 1 All ER (Comm) 481, [2002] 1 WLR 1; and see *Steel v Dixon*(1881) 17 ChD 825. A provision requiring the assured to give notice of claim does not modify or exclude the equitable right to contribution: see *Legal and General Assurance Society Ltd v Drake Insurance Co Ltd*[1992] QB 887, [1992] 1 All ER 283, CA.

2 See FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1165 et seq.

3 *Dering v Earl of Winchelsea* (1787) 1 Cox Eq Cas 318; *Stirling v Forrester* (1821) 3 Bligh 575 at 596; *Ward v National Bank of New Zealand Ltd*(1883) 8 App Cas 755 at 765, PC, per Sir Robert Collier; *Commercial Union Assurance Co Ltd v Hayden*[1977] QB 804, [1977] 1 All ER 441, CA; *Barclays Bank Ltd v TOSG Trust Fund Ltd*[1984] AC 626 at 652-653, [1984] 1 All ER 628 at 648, CA, per Kerr LJ; affd [1984] AC 626 at 664, [1984] 1 All ER 1060, HL; *Scholefield Goodman & Sons Ltd v Zyngier*[1986] AC 562, [1985] 3 All ER 105, PC; *TCB Ltd v Gray*[1987] Ch 458n, [1988] 1 All ER 108, CA; *Stimpson v Smith*[1999] Ch 340, [1999] 2 All ER 833, CA. In *Legal and General Assurance Society Ltd v Drake Insurance Co Ltd*[1992] QB 887, [1992] 1 All ER 283, CA, it was said that the right of contribution from co-insurers, like co-sureties, arises in equity from the existence of a co-insurer and does not require any agreement. There is perhaps some doubt whether the analogy with co-sureties is a reliable guide for co-insurers: *Commercial Union Assurance Co Ltd v Hayden* supra. See also *James Graham & Co (Timber) Ltd v Southgate Sands*[1986] QB 80, [1985] 2 All ER 344, CA; and INSURANCE vol 25 (2003 Reissue) PARA 495 et seq.

4 *Johnson v Wild*(1890) 44 ChD 146. Hence there is no contribution where each surety undertakes a distinct part of the principal debt: *Coope v Twynam* (1823) Turn & R 426.

5 *Copis v Middleton* (1823) Turn & R 224.

6 *Hodgson v Shaw* (1834) 3 My & K 183; and see the Mercantile Law Amendment Act 1856 s 5; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1013 et seq.

7 In numerous cases contribution was recognised in early times at law, and after judgment against one party contribution was enforced against others by proceedings taken on the judgment by writ of audita querela or scire facias: *Harbert's Case* (1584) 3 Co Rep 11b; *Dering v Earl of Winchelsea* (1787) 1 Cox Eq Cas 318. It then came to be enforced at law, as between co-sureties, in assumpsit on the footing of implied contract, but this involved a separate judgment against each surety: *Cowell v Edwards* (1800) 2 Bos & P 268; *Craythorne v Swinburne* (1807) 14 Ves 160 at 164; *Wolmershausen v Gullick*[1893] 2 Ch 514 at 519; and see 1 Wms Saund 264c note (e); *Re Snowdon, ex p Snowdon*(1881) 17 ChD 44, CA. Actions for contribution between partners

were also entertained at law, but this did not oust the jurisdiction in equity: *Wright v Hunter* (1801) 5 Ves 792. As to a company director's right to contribution see COMPANIES vol 14 (2009) PARA 592.

8 See PARA 459 post.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/J. CONTRIBUTION/459. Contribution between sureties and between persons and funds.

#### **459. Contribution between sureties and between persons and funds.**

A surety who has paid more than his share of the common liability is entitled to contribution from his co-sureties<sup>1</sup>. The right was not originally recognised at common law<sup>2</sup>. After it had become so recognised, the jurisdiction in equity continued to be more convenient and extensive. It was more convenient because, when the sureties were numerous and bound by different instruments, it was possible by a single suit in equity, in which all the sureties were made defendants, to achieve that which at common law was accomplished only by separate actions against the different sureties to recover their respective contributions<sup>3</sup>. It was more extensive because it enabled the mutual liabilities to be adjusted more completely. Thus at law a surety who had paid the whole debt could recover from each of his co-sureties only an aliquot part according to the whole number of sureties; and, if one was insolvent, he had no further right against the rest<sup>4</sup>, whereas in equity he could make the solvent sureties contribute rateably to the entire debt<sup>5</sup>. The equitable rule now prevails<sup>6</sup>. It is immaterial whether the co-guarantors are bound jointly or severally, or jointly and severally, or by the same instrument, or by separate instruments, or in the same sum, or different sums, or at the same time, or different times, or whether the co-guarantor making payment knows of the existence of the other co-guarantor or co-guarantors<sup>7</sup>. At law the death of a surety put an end to his liability to contribute, while in equity the liability could be enforced against his estate<sup>8</sup>.

If a creditor has a right to come upon more than one person or fund for the payment of a debt, there is an equity between the persons interested in the different funds that each shall bear no more than its due proportion<sup>9</sup>. Where a co-surety, not acting officiously or voluntarily, pays an ascertained and guaranteed liability of the debtor, he is entitled to a contribution from his co-surety even though the creditor has not made a formal written demand as required by the guarantee<sup>10</sup>.

Where there had been an equitable apportionment of the rent on the assignment of part of the land comprised in a lease, the tenant of one part who had paid the whole of the rent claimed by the landlord under the threat of the process of distress, though not liable to be directly sued for that amount, was entitled to sue the tenant of the other part for reimbursement of the latter's proportion of the rent so paid<sup>11</sup>.

It is not clear whether the Civil Liability (Contribution) Act 1978<sup>12</sup> applies to a claim for contribution between co-sureties<sup>13</sup>. Part 20 of the Civil Procedure Rules (the 'CPR')<sup>14</sup> is designed to enable claims for contribution or indemnity to be managed in the most convenient and effective manner.

1 This right is said to have existed in equity from the very earliest times (*Underhill v Horwood* (1804) 10 Ves 209 at 226 per Lord Eldon LC); and at all events from the time of Elizabeth I (*Wolmershausen v Gullick*) [1893] 2 Ch 514 at 520 per Wright J), though there is no reported instance of contribution between sureties before the seventeenth century (*Wolmershausen v Gullick* supra).

2 *Offley and Johnson's Case* (1584) 2 Leon 166; and see *Toussaint v Martinnant* (1787) 2 Term Rep 100 at 105 per Buller J; *Edger v Knapp* (1843) 6 Scott NR 707 at 713 per Tindal CJ. The right was, however, recognised by the custom of London: *Layer v Nelson* (1687) 1 Vern 456; *Offley and Johnson's Case* supra; and see *Wolmershausen v Gullick* [1893] 2 Ch 514 at 520 per Wright J.

3 *Craythorne v Swinburne* (1807) 14 Ves 160 at 164 per Lord Eldon LC; *Macdonald v Whitfield* (1883) 8 App Cas 733, PC.

- 4 *Cowell v Edwards* (1800) 2 Bos & P 268; *Browne v Lee* (1827) 6 B & C 689.
- 5 *Peter v Rich* (1629) 1 Rep Ch 34; *Hole v Harrison* (1673) 1 Cas in Ch 246; *Hitchman v Stewart* (1855) 3 Drew 271.
- 6 *Lowe v Dixon* (1885) 16 QBD 455.
- 7 *Stimpson v Smith* [1999] Ch 340 at 348, [1999] 2 All ER 833 at 837, CA, per Peter Gibson LJ.
- 8 *Primrose v Bromley* (1739) 1 Atk 89.
- 9 See *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 19, HL, per Lord Blackburn; *Brown v Cork* [1985] BCLC 363, CA; *Scholefield Goodman & Sons Ltd v Zyngier* [1986] AC 562, [1985] 3 All ER 105, PC. See also *Allied London Investments Ltd v Hambro Life Assurance Ltd* (1985) 50 P & CR 207, CA; *Selous Street Properties Ltd v Oronel Fabrics Ltd* (1984) 270 Estates Gazette 643.
- 10 *Stimpson v Smith* [1999] Ch 340, [1999] 2 All ER 833, CA.
- 11 *Whitham v Bullock* [1939] 2 KB 81, [1939] 2 All ER 310, CA.
- 12 Ie the Civil Liability (Contribution) Act 1978 s 1: see DAMAGES vol 12(1) (Reissue) PARAS 837-839; TORT vol 45(2) (Reissue) PARA 349 et seq.
- 13 *Barclays Bank plc v Miller (Frank, third party)* [1990] 1 All ER 1040, [1990] 1 WLR 343, CA.
- 14 Ie CPR Pt 20: see CIVIL PROCEDURE vol 11 (2009) PARA 618 et seq.

## UPDATE

### 459 Contribution between sureties and between persons and funds

NOTE 14--CPR Pt 20 substituted: SI 2005/3515.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/K. ADMINISTRATION OF ESTATES/460. Historical development of administration actions.

## **K. ADMINISTRATION OF ESTATES**

### **460. Historical development of administration actions.**

The former Court of Chancery acquired jurisdiction in the administration of the estates of deceased persons in consequence of the defective remedies afforded in the common law and the ecclesiastical courts. A creditor could sue the personal representative at law and recover judgment for his debt, but he could not obtain discovery or an account of the assets; nor could these be made available for all the creditors in a due course of administration; and, although the estate was to some extent under the control of the ecclesiastical court in which the will was proved or administration granted, a creditor could not contest the inventory exhibited by the personal representative<sup>1</sup>; nor could he take advantage of a breach of the administrator's bond<sup>2</sup>.

Consequently it became the practice for the creditor to proceed in equity for discovery<sup>3</sup> and an account of the assets, and equity, having possession of the cause for these purposes, in order to avoid multiplicity of actions, gave substantial relief also and decreed payment of the debt<sup>4</sup>. At first the creditor sued only for his own debt and obtained a decree for an account of the assets coming to the hands of the personal representative, and for payment of his debt in a due course of administration<sup>5</sup>. Subsequently he sued on behalf of all the creditors, and the decree was for an account of debts and of assets and for payment of the debts<sup>6</sup>. Until decree he remained *dominus litis* and could dismiss the action, and the executor, on paying his debt and costs, was entitled to have it dismissed<sup>7</sup>. After decree, however, he could not deprive other persons of the benefit of the decree if they wished to prosecute it<sup>8</sup>.

The intervention of equity was necessary also on behalf of legatees and next of kin. A legatee could sue at law for a specific legacy on the executor's assenting to the bequest, since the assent vested the legal title in him, but he could not sue for a pecuniary legacy<sup>9</sup>; and, although he could sue in the ecclesiastical court, the machinery of that court was not adapted for securing a due distribution of the estate among the persons entitled. In particular, if there was no disposition of the residue, the ecclesiastical court could not direct distribution among the next of kin<sup>10</sup>.

Consequently the jurisdiction of equity in administration extended to the distribution of the estate among the persons beneficially entitled<sup>11</sup>. At first a legatee could sue only for his own legacy<sup>12</sup>, but the proceedings came to be enlarged in their scope as in the case of a creditor's action. If the executor admitted assets, the legatee continued to be entitled to a decree for payment<sup>13</sup>, but otherwise an account of all the legacies was directed with an order for payment rateably<sup>14</sup>. The action involved an account of the personal estate, and also, since debts had priority over legacies, an account of debts, and hence a creditor could make his claim in the action<sup>15</sup>. Neither the residuary legatees nor other legatees were necessary parties to an action by a specific or pecuniary legatee; but in an action by one of several residuary legatees all other persons interested in the residue, after satisfaction of creditors and specific and pecuniary legatees, had to be before the court<sup>16</sup>. Until decree other legatees or creditors could take proceedings in equity<sup>17</sup>.

As the jurisdiction of equity in administration was concurrent with that at law and in the ecclesiastical courts, it became necessary to prevent simultaneous proceedings in these different courts. After the filing of a bill<sup>18</sup> in equity a legatee was restrained from proceeding in

the ecclesiastical court<sup>19</sup>, and thus the Court of Chancery acquired exclusive control of the administration so far as legatees were concerned. Actions by creditors at common law were not restrained until there was a decree for general administration, and until such a decree a creditor was entitled to proceed to judgment, and so obtain priority. As regards priority, a decree in equity was equivalent to a judgment at law, and consequently a creditor suing for himself alone gained priority by the decree over a subsequent judgment creditor<sup>20</sup>, provided that the decree was for an ascertained sum and not merely for an account with consequential direction for payment<sup>21</sup>.

Where a general decree for administration was made, this operated as a judgment in favour of all the creditors who came in under it<sup>22</sup>; and creditors were restrained from proceeding at law after such a decree<sup>23</sup>, although, to prevent abuse in consequence of a decree being obtained by a friendly creditor, the executor, as a condition of the injunction, was required to make an affidavit of assets<sup>24</sup>. A creditor who had obtained judgment at law before the decree for administration was prima facie entitled to levy execution, either on the goods of the testator if the judgment concerned the testator's goods, or on the goods of the executor as well if it also concerned the executor's goods. In the former case the execution would be restrained, the creditor being at the same time allowed his legal priority as against the assets<sup>25</sup>; in the latter case it seems that the execution against the testator's assets would not be restrained since this would prejudice the recourse to the executor's goods<sup>26</sup>.

1 *Archbishop of Canterbury v Wills* (1708) 1 Salk 315. This was on the ground that his proper remedy was at law. As to the former Court of Chancery see PARAS 401-403 ante.

2 The bond was intended for the benefit of the legatees and next of kin: *Wallis v Pipon* (1753) Amb 183; and see *Ashley v Baillie* (1751) 2 Ves Sen 368 at 369-370. A creditor who took an assignment of the bond from the Ordinary would be restrained in equity from suing on it, upon terms of the personal representative accounting, and of the bond being a security for costs at law and in equity: *Thomas v Archbishop of Canterbury* (1787) 1 Cox Eq Cas 399 at 401, explaining *Greenside v Benson* (1745) 3 Atk 248 at 252-253; and see *Bolton v Powell* (1852) 2 De GM & G 1 at 21. Administration bonds are no longer required; instead sureties are required in certain cases only: see the Supreme Court Act 1981 s 120; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 255.

3 The modern term for 'discovery' is 'disclosure': see CIVIL PROCEDURE vol 11 (2009) PARA 538 et seq.

4 *Morrice v Bank of England* (1735) 3 P Wms 402n, (1736) 3 Swan 573; affd sub nom *Bank of England v Morrice* (1737) 2 Bro Parl Cas 465; *Barker v Dumeres* (1740) Barn Ch 277 at 278; and see *Alexander v Alexander* (1669) 2 Rep Ch 37 at 38. Moreover, at law the creditor reached only legal assets: *Cox's Creditors' Case* (1734) 3 P Wms 341; and see PARA 461 post.

5 *A-G v Cornthwaite* (1788) 2 Cox Eq Cas 44. In such administration all debts of a higher or equal nature might be paid by the executor, and were allowed to him in his discharge: see *Anon* (1747) 3 Atk 572.

6 Legislative sanction was given to administration decrees as to personal estate, and facility was conferred for obtaining them, by 15 & 16 Vict c 86 (Court of Chancery Procedure) (1852) (repealed), and then it ceased to be necessary for the action to be brought on behalf of all creditors, unless real estate also was involved: *Re Greaves, Bray v Tofield* (1881) 18 ChD 551 at 554; and see *Wooldridge v Norris* (1868) LR 6 Eq 410 at 414. Since the Land Transfer Act 1897 (replaced in this respect by the Administration of Estates Act 1925 Pt I (ss 1-3 (as amended): see EXECUTORS AND ADMINISTRATORS)), a creditor may sue for administration of real as well as personal estate without stating that he sues on behalf of all the creditors: *Re James, James v Jones* [1911] 2 Ch 348.

7 *Pemberton v Topham* (1838) 1 Beav 316; *Re Greaves, Bray v Tofield* (1881) 18 ChD 551.

8 *Handford v Storie* (1825) 2 Sim & St 196; and see *Re Alpha Co Ltd, Ward v Alpha Co Ltd* [1903] 1 Ch 203.

9 *Deeks v Strutt* (1794) 5 Term Rep 690; and see *Brown v Elton* (1733) 3 P Wms 202 at 205. After executors had presented an account showing money to be in their hands on behalf of the legatee, they were liable to be sued at law: *Topham v Morecraft* (1858) 8 E & B 972; and see *Harding v Harding* (1886) 17 QBD 442.

10 Unless the will showed an intention that the executors should take the undisposed-of residue beneficially, they were trustees for the next of kin, but the ecclesiastical court could not enforce the execution of a trust: *Farrington v Knightly* (1721) 1 P Wms 544 at 549, 550 note (1).

11 In *Adair v Shaw* (1803) 1 Sch & Lef 243 at 262, Lord Redesdale LC based the whole jurisdiction of equity in administration on the court's duty to enforce the execution of trusts, but this was incorrect.

The duties of a personal representative are to a large extent legal duties, and equity recognises this in requiring legal assets to be distributed in accordance with legal rules. The jurisdiction of equity was based on the superior advantages afforded by discovery by the taking of accounts and by the adjudication on the claims of creditors and beneficiaries in one action.

12 *Haycock v Haycock* (1682) 2 Cas in Ch 124.

13 *Boys v Ford* (1819) 4 Madd 40.

14 Mitford, Pleadings in Chancery (5th Edn) 194.

15 See *Sims v Ridge* (1817) 3 Mer 458 at 464.

16 Mitford, Pleadings in Chancery (5th Edn) 194 note (p).

17 *Handford v Storie* (1825) 2 Sim & St 196 at 198; *Martin v Martin* (1749) 1 Ves Sen 211.

18 The bill was the originating process. For the modern procedure for claims to determine any question on the administration of the estate of a deceased person and claims for an order for the administration of the estate of a deceased person to be carried out under the direction of the court ('an administration order') see CPR 64.1-64.4; *Practice Direction--Estates, Trusts and Charities* PD64A para 1-6.

19 *Stonehouse v Stonehouse* (1745) 1 Dick 98; *Smith v Kempson* (1790) 2 Dick 769.

20 *Morrice v Bank of England* (1735) 3 P Wms 420n, (1736) 3 Swan 573 at 576 et seq; affd sub nom *Bank of England v Morrice* (1737) 2 Bro Parl Cas 465.

21 *Perry v Phelps* (1804) 10 Ves 34.

22 *Paxton v Douglas* (1803) 8 Ves 520.

23 This was necessary since the decree was not recognised at law (*Paxton v Douglas* (1803) 8 Ves 520), and was justified on the ground that, since the court had taken the administration into its own hands, the executor must be protected in obeying the decree (*Kenyon v Worthington* (1786) 2 Dick 668 at 669; *Books v Reynolds* (1782) 1 Bro CC 183; and see *Martin v Martin* (1749) 1 Ves Sen 211; *Goate v Fryer* (1789) 3 Bro CC 23 at 24).

24 *Paxton v Douglas* (1803) 8 Ves 520; *Gilpin v Lady Southampton* (1812) 18 Ves 469 at 470.

25 *Clarke v Earl of Ormonde* (1821) Jac 108 at 124; but see *Lee v Park* (1836) 1 Keen 714 at 724. The creditor was entitled to the fruits of an execution levied and in the sheriff's hands before decree: *Re Skiggs, Marriage v Skiggs* (1859) 4 De G & J 4.

26 *Lee v Park* (1836) 1 Keen 714; *Drewry v Thacker* (1819) 3 Swan 529 at 547; *Lord v Wormleighton* (1821) Jac 148 at 150; and see *Re Womersley, Etheridge v Womersley* (1885) 29 ChD 557 at 559. As to the position where judgment has not been obtained see *Re Stubb's Estate, Hanson v Stubbs* (1878) 8 ChD 154; and EXECUTORS AND ADMINISTRATORS.

## UPDATE

### 460 Historical development of administration actions

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/K. ADMINISTRATION OF ESTATES/461. Former distinction between legal and equitable assets.

#### 461. Former distinction between legal and equitable assets.

Formerly there was a difference between the rules of common law and equity with regard to the order of payment of debts. At common law specialty debts had priority over simple contract debts; but in equity both were payable on an equal footing<sup>1</sup>. This difference gave importance to the distinction between legal and equitable assets. Legal assets were subject to the common law rule both when they were being dealt with at common law and in equity, since, as to them, equity followed the law<sup>2</sup>. Equitable assets were dealt with only in equity, and were subject to the equitable rule.

The Administration of Estates Act 1925 provides generally that the real and personal estate, whether legal or equitable, of a deceased person, to the extent of his beneficial interest therein, are assets for payment of his debts, whether by specialty or simple contract<sup>3</sup>. The effect is to abolish the distinction between legal and equitable assets<sup>4</sup>.

1 See *Cox's Creditors' Case* (1734) 3 P Wms 341; *Turner v Turner* (1819) 1 Jac & W 39 at 45. 'A debt without specialty is as much as a debt jure naturali, and in conscience as a debt by specialty, and therefore shall have an equity with debts by specialty where conscience is the judge': *Hixon v Wytham* (1675) 1 Cas in Ch 248.

2 If a specialty creditor had been partly paid out of legal assets, however, he was not allowed to participate in equitable assets until the other creditors had received a like proportion: *Morrice v Bank of England* as reported in (1736) Cas temp Talb 217 at 220; affd sub nom *Bank of England v Morrice* (1737) 2 Bro Parl Cas 465; *Wride v Clarke* (1766) 1 Dick 382.

The distinction between legal and equitable assets referred to the remedies of the creditor and not to the nature of the property. Assets which the creditor could make available for the satisfaction of his debt in an action at law were legal assets: *Cook v Gregson* (1856) 3 Drew 547 at 549; *Shee v French*, *French v French* (1857) 3 Drew 716; *A-G v Brunning* (1860) 8 HL Cas 243 at 258 per Lord Cranworth; *O'Grady v Wilmot* [1916] 2 AC 231 at 251-254, HL. These included all assets which an executor could recover by virtue of his office, notwithstanding that the executor might have to sue for them in equity, since at law the creditor could charge the executor with all such assets: see *Wilson v Fielding* (1718) 2 Vern 763; *Cox's Creditors' Case* (1734) 3 P Wms 341; *A-G v Brunning* (1860) 8 HL Cas 243 at 258, 259. Assets which a creditor could reach only by a suit in equity were equitable assets; of this nature were the proceeds of sale of land devised on trust for, or charged with, payment of the testator's debts: *Silk v Prime* (1766) 1 Bro CC 138n; *Foly's Case* (1679) Freem Ch 49 at 50. It was at one time a question whether a devise to executors, or a power for them, to sell for payment of debts made the proceeds legal or equitable assets. At first they were treated as legal assets, since the proceeds came to the executors' hands (*Blatch v Wilder* (1738) West temp Hard 322); later a devise to executors made the land an equitable asset since the executors were treated, for the purpose of the devise, as trustees (*Silk v Prime* supra; *Bain v Sadler* (1871) LR 12 Eq 570), and apparently a mere power for them to sell also made the land an equitable asset (*Newton v Bennet* (1782) 1 Bro CC 135; *Barker v Boucher* (1784) 1 Bro CC 140 note (4)). As to the whole subject see the note to *Blatch v Wilder* supra.

Personal property and effects, including chattel real interests, were legal assets in the hands of the executor (Shep Touch (7th Edn) 496; Toller, Law of Executors (7th Edn, 1838) p 133 et seq; *Mutlow v Mutlow* (1859) 4 De G & J 539), even though the testator had merely an equitable estate in them (*Cook v Gregson* (1856) 3 Drew 547; *Mutlow v Mutlow* supra). Personal property subject to a general power of appointment by will constitutes assets for the payment of debts in the executors' hands, and, hence, legal assets: *Re Hadley*, *Johnson v Hadley* [1909] 1 Ch 20 at 32, CA, per Cozens-Hardy MR and at 36 per Farwell LJ; and see *Beyfus v Lavley* [1903] AC 411, HL.

Under the Administration of Estates Act 1833 (repealed with savings and replaced by the Administration of Estates Act 1925 s 32: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 387), real estate subject to a general power of appointment by will became, like real estate of the testator, assets for payment of his debts: *Fleming v Buchanan* (1853) 3 De GM & G 976.

3 See the Administration of Estates Act 1925 s 32; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 387.

Before 1833, unless land was made liable by the testator for payment of his debts, it was not available as an asset for creditors generally (*Townsend v Kilmurrey* (1637) Toth 121), although it was liable in the hands of the heir or devisee to specialty debts by which the heirs were bound ((see 3 Will & Mar c 14 (Fraudulent Devises) (1691) (repealed and re-enacted in altered form by the Debts Recovery Act 1830, itself repealed by the Administration of Estates Act 1925)). A provision for following assets was made by the Administration of Estates Act 1925 s 38 (as amended), subject to a saving (see s 32(2)) as to persons taking in good faith under a beneficiary. A devise in trust for payment of debts took the land out of the former statutes and made it equitable assets: *Spackman v Timbrell* (1837) 8 Sim 253; *Bailey v Ekins* (1802) 7 Ves 319. By the Administration of Estates Act 1833 (repealed) (Sir John Romilly's Act) land was made liable, in proceedings in a court of equity, to specialty and simple contract debts generally, but the priority of specialty debts by which the heirs were bound was preserved. There was no charge of debts on real estate thereunder until judgment for administration of the real estate had been obtained: *British Mutual Investment Co v Smart* (1875) 10 Ch App 567; *Re Moon, Holmes v Holmes* [1907] 2 Ch 304. The rents and profits of the realty after the death were assets by accretion: *Re Hyatt, Bowles v Hyatt* (1888) 38 ChD 609. The effect was that land became an asset to be dealt with in a court of equity in accordance with that Act (*Re Illidge, Davidson v Illidge* (1884) 27 ChD 478 at 484, CA) but, if it had been made liable to debts by the testator's will, it continued to be an equitable asset apart from that Act. The Act was expressly confined to real estate which the testator had not by will charged with, or devised subject to, the payment of his debts: see *Ball v Harris* (1839) 4 My & Cr 264. Cf *Turner v Cox* (1853) 8 Moo PCC 288. By the Administration of Estates Act 1869 (repealed) (Hinde Palmer's Act) specialty debts of all kinds and simple contract debts were put on the same footing for the purpose of administration, and the distinction between legal and equitable assets lost most of its importance.

4 The court may subject land to a charge for the payment of the amount due under a judgment, the charge having the same effect as an equitable charge created by the debtor: see the Charging Orders Act 1979 ss 1-3 (as amended); and CIVIL PROCEDURE vol 12 (2009) PARA 1467 et seq.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/K. ADMINISTRATION OF ESTATES/462. The modern law.

#### **462. The modern law.**

The procedure applying to claims to determine any question on the administration of the estate of a deceased person and claims for an order for the administration of the estate of a deceased person to be carried out under the direction of the court ('an administration order') is now governed by the Civil Procedure Rules ('CPR')<sup>1</sup>. The modern law concerning the administration of estates is dealt with elsewhere in this work<sup>2</sup>.

1 See CPR 64.1-64.4; *Practice Direction--Estates, Trusts and Charities* PD64A para 1-6.

2 See EXECUTORS AND ADMINISTRATORS.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/L. PARTNERSHIP/463. Development of partnership jurisdiction; in general.

## ***L. PARTNERSHIP***

### **463. Development of partnership jurisdiction; in general.**

The former Court of Chancery exercised jurisdiction in matters of partnership<sup>1</sup> in consequence of the manifest superiority of the remedies which it could give over those available at law, which provided a partner only with an action of covenant or of assumpsit for breach of the partnership agreement, and an action of account<sup>2</sup>. Actions of covenant and assumpsit did not suitably provide for all the questions which might arise as between the partners themselves, and as between the partners and their joint and separate creditors, while the action of account at law was an impracticable remedy<sup>3</sup>.

1 See generally PARTNERSHIP. As to the former Court of Chancery see PARAS 401-403 ante.

2 As to the action of account between partners see Co Litt 172a.

3 See PARA 449 ante.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/L. PARTNERSHIP/464. Rights of partners between themselves.

#### **464. Rights of partners between themselves.**

In equity the special remedies and doctrines of the jurisdiction were and still are available in a variety of ways to adjust the rights and liabilities of partners. Although specific performance of an agreement to enter into partnership was not as a rule decreed, for the reason that a partnership could not be expected to be successful if it commenced in mutual distrust, dissatisfaction or enmity<sup>1</sup>, yet, where the agreement was for a fixed term and had been already partly performed, and where it was necessary that the partners' status should be determined, the agreement would be specifically enforced<sup>2</sup>. In a partnership action discovery<sup>3</sup> might be wanted to prove the fact of partnership, or to procure information about partnership transactions<sup>4</sup>. If there were reasons which prevented the effective carrying on of the partnership, there was jurisdiction in equity to order a dissolution even if the stipulated period had not expired<sup>5</sup>. Where a dissolution had occurred, the procedure in equity allowed the partnership accounts to be taken, and this might be done, if necessary, even without a dissolution<sup>6</sup>. Both during the partnership and after its dissolution the appointment of a receiver, or a receiver and manager, might be expedient<sup>7</sup>, or it might be proper to restrain one of the partners by injunction from acting in violation of the partnership contract, or contrary to the interests of the other partners<sup>8</sup>.

1 Story, Equity Jurisprudence s 666.

2 *Buxton v Lister* (1746) 3 Atk 383; *Crawshay v Maule* (1818) 1 Swan 495 at 509 note (a); *England v Curling* (1844) 8 Beav 129; *Scott v Rayment* (1868) LR 7 Eq 112.

3 The modern term for 'discovery' is 'disclosure': see CIVIL PROCEDURE vol 11 (2009) PARA 538 et seq.

4 See *Sanders v King* (1821) 6 Madd 61; *Harris v Harris* (1844) 3 Hare 450; *Mansell v Feeney* (1861) 2 John & H 313; *Kennedy v Dodson* [1895] 1 Ch 334, CA.

5 *Waters v Taylor* (1813) 2 Ves & B 299; *Anon* (1856) 2 K & J 441 at 447; *Jones v Lloyd* (1874) LR 18 Eq 265 at 274.

6 Lord Eldon refused an account unless a dissolution was prayed: *Forman v Homfray* (1813) 2 Ves & B 329; and see *Loscombe v Russell* (1830) 4 Sim 8 per Shadwell V-C; cf *Harrison v Armitage* (1819) 4 Madd 143 per Leach V-C; *Wallworth v Holt* (1841) 4 My & Cr 619 at 635-639 per Lord Cottenham. As to the cases in which an account will now be ordered without a dissolution see PARTNERSHIP vol 79 (2008) PARA 151.

7 See PARTNERSHIP vol 79 (2008) PARA 162 et seq.

8 See PARTNERSHIP vol 79 (2008) PARA 166 et seq.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/L. PARTNERSHIP/465. Rights of creditors.

#### 465. Rights of creditors.

The interference of equity was necessary when questions arose between partners and their creditors. A judgment creditor of one partner could take in execution, not his share in the partnership chattels, but only his interest after the accounts had been taken and the partnership liabilities provided for<sup>1</sup>, and this could be done effectively only in equity. Equitable doctrines, for example the doctrine of marshalling, were required to give joint creditors a preference against the joint assets, and separate creditors against the separate assets<sup>2</sup>; and in equity a joint covenant by partners was treated as several on the death of a partner, so that the covenantee could recover against his estate<sup>3</sup>. In addition, real estate of the partnership, which was vested in one of the partners, or in the partners jointly, was treated as partnership assets, and the beneficial interest of the partners devolved as personalty<sup>4</sup>. These were some of the reasons which gave equity a concurrent, and in practice almost an exclusive, jurisdiction in partnership matters<sup>5</sup>, and which led to the assignment of partnership matters to the Chancery Division of the High Court.

1 *Waters v Taylor* (1813) 2 Ves & B 299 at 301; *Re Wait* (1820) 1 Jac & W 605 at 608; and see *West v Skip* (1749) 1 Ves Sen 239; *Dutton v Morrison* (1810) 17 Ves 193 at 206; *Habershon v Blurton* (1847) 1 De G & Sm 121.

2 *Twiss v Massey* (1737) 1 Atk 67; *Dutton v Morrison* (1810) 17 Ves 193 at 209.

3 *Devaynes v Noble, Sleech's Case* (1816) 1 Mer 529 at 539; *Devaynes v Noble* (1831) 2 Russ & M 495 at 505-507; *Wilkinson v Henderson* (1833) 1 My & K 582; *Thorpe v Jackson* (1837) 2 Y & C Ex 553; *Kendall v Hamilton* (1879) 4 App Cas 504 at 517, HL; *Re McRae, Forster v Davis, Norden v McRae* (1883) 25 ChD 16 at 19, CA; *Re Hodgson, Beckett v Ramsdale* (1885) 31 ChD 177, CA; *Re Doetsch, Matheson v Ludwig* [1896] 2 Ch 836 at 839; and see *Ex p Kendall* (1811) 17 Ves 514.

4 *Lake v Craddock* (1733) 3 P Wms 158; *Jackson v Jackson* (1804) 9 Ves 591 at 597, citing *Elliot v Brown* (1791) 3 Swan 489n; *Houghton v Houghton* (1841) 11 Sim 491; *Davies v Games* (1879) 12 ChD 813; but as to the limits of this application of the doctrine of conversion see *Randall v Randall* (1835) 7 Sim 271; the Partnership Act 1890 s 20(3); *Davis v Davis* [1894] 1 Ch 393; and PARTNERSHIP vol 79 (2008) PARAS 118-119. The position today of the equitable rule is uncertain. It was made statutory by the Partnership Act 1890 s 22, subject to the expression of a contrary intention, not only as between the partners, including the personal representatives of a deceased partner, but as between the persons entitled to the real and personal property of a deceased partner. Section 22 was repealed by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4, but it is not clear whether the consequence is that there is no conversion, or whether the equitable rule is restored. The answer would seem to depend on whether that rule was based on contract (see *Darby v Darby* (1853) 3 Drew 495), or on an implied trust for sale (see *A-G v Hubbuck* (1884) 13 QBD 275, CA). Only in the latter case would the Trusts of Land and Appointment of Trustees Act 1996 s 3 apply to prevent the operation of the doctrine of conversion. A conveyance of land to partners, as joint tenants, created a trust for sale before the Trusts of Land and Appointment of Trustees Act 1996. It now creates a trust of land: see the Law of Property Act 1925 s 36 (amended by the Law of Property (Amendment) Act 1926, s 7, Schedule; the Trusts of Land and Appointment of Trustees Act 1996 s 5, Sch 2 para 4(1)-(3)). The amendments made by the 1996 Act apply to conveyances of land to partners as joint tenants whenever made: Trusts of Land and Appointment of Trustees Act 1996 Sch 2 para 4(4). See further PARA 717 post; and PARTNERSHIP vol 79 (2008) PARAS 118-119.

5 Story, Equity Jurisprudence s 683.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/M. DETERMINATION OF BOUNDARIES/466. Boundaries.

## **M. DETERMINATION OF BOUNDARIES**

### **466. Boundaries.**

From early times the former Court of Chancery exercised a jurisdiction to determine boundaries where the land of adjoining proprietors had become confused, and where there was also some special reason for the assistance of equity<sup>1</sup>. An inquiry into boundaries was usually effected by the issue of a commission<sup>2</sup>. At first this jurisdiction was exercised only with the consent of the parties<sup>3</sup>; but later the necessity for consent was dispensed with where the party seeking relief showed that:

- 24 (1) there was a confusion of boundaries<sup>4</sup>;
- 25 (2) he had no adequate remedy at law<sup>5</sup>;
- 26 (3) the party against whom he claimed was under some equitable obligation to preserve the identity of boundaries<sup>6</sup> and was in possession of the land<sup>7</sup>; and
- 27 (4) he had a clear right to part of the land<sup>8</sup>, or that such right was not disputed<sup>9</sup>, as, for example, where a tenant or a copyholder had destroyed or not preserved the boundaries between his own property and that of his landlord or lord.

All parties interested were required to be before the court<sup>10</sup>. Courts of equity would not assume jurisdiction to settle boundaries between parishes<sup>11</sup>.

It is apprehended that the same principles would still apply, and that a mere confusion of boundaries is not in itself sufficient ground, except by consent, to support a claim for a commission<sup>12</sup>, which would be granted only where some equity is shown arising out of the inequitable conduct of one of the parties<sup>13</sup>.

As a rule the commission would direct that, in the event of the boundaries being so confused and obliterated that the commissioners were unable to distinguish the boundaries, the commissioners were to set out new land of equal value with the land whose boundaries had been confused<sup>14</sup>.

There is now a statutory procedure for determining the boundaries of registered land<sup>15</sup>.

1 See also BOUNDARIES vol 4(1) (2002 Reissue) PARA 914.

2 As to such commissions generally see *Speer v Crawler* (1817) 2 Mer 410; *Wake v Conyers* (1759) 1 Eden 331 and the notes thereto in 1 White and Tud LC (9th Edn) 171 et seq; Hunt, Law of Boundaries and Fences (6th Edn, 1912) p 251 et seq.

In the following cases it has been held that the facts were sufficient to entitle the plaintiff (now known as the 'claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18) to the equitable relief of a commission: (1) where the defendant had ploughed up or otherwise actively confused the boundaries (see the cases cited in note 13 infra); (2) where several offices had existed for some time in the hands of one individual, and in consequence the land allotted to the different offices had become confused (*Kennedy v Trott* (1849) 6 Moo PCC 449); (3) where a debtor's land lay intermixed with other land and the creditor proved that the boundaries were confused (*Mullineux v Mullineux* (1617) Toth 39). See also cases where charity trustees have intermixed charity land with other land, thus confusing the boundaries: *A-G v Bowyer* (1800) 5 Ves 300; *Solicitor General v Bath Corpn* (1849) 18 LJ Ch 275; *A-G v Stephens* (1855) 6 De GM & G 111; and see CHARITIES vol 8 (2010) PARA 438.

There is, however, no recent example of a commission being granted. As to registered land see the text and note 15 infra.

3 See the form of a bill to set out metes and bounds and to perpetuate testimony in *Hint v White*, set out in the Calendar of the Proceedings in the Court of Chancery *temp* Queen Elizabeth vol 1 p cxlvii, published by the Record Commission 1827, which recites that a previous commission was issued with the consent of the plaintiff's predecessor in title and the defendant; *Spyer v Spyer* (1631) Nels 14.

4 *Lethieullier v Lord Castlemain* (1726) 1 Dick 46; *Earl of Darlington v Bowes* (1759) 1 Eden 270; *Lascelles v Butt* (1876) 2 ChD 588; *Hicks v Hastings* (1857) 3 K & J 701.

5 See *Basingstoke Corp v Lord Bolton* (1852) 1 Drew 270 at 289; subsequent proceedings (1854) 3 Drew 50 at 63.

6 *Grierson v Eyre* (1804) 9 Ves 341 at 345; *Speer v Crawter* (1817) 2 Mer 410; *Harding v Countess of Suffolk* (1632) 1 Rep Ch 61; *A-G v Fullerton* (1813) 2 Ves & B 263; *Aston v Lord Exeter* (1801) 6 Ves 288 at 293; *Duke of Leeds v Earl of Strafford* (1798) 4 Ves 180.

7 *A-G v Stephens* (1855) 6 De GM & G 111 at 149.

8 *Chapman v Spencer* (1731) 2 Eq Cas Abr 163; *Loker v Rolle* (1795) 3 Ves 4 at 7; *Chalk v Wyatt* (1810) 3 Mer 688 per Lord Eldon LC; *Bishop of Ely v Kenrick* (1732) Bunb 322; *Webb v Banks* (1739) 2 Eq Cas Abr 164; *Godfrey v Littell* (1831) 2 Russ & M 630.

9 *Boteler v Spelman* (1673) Cas *temp* Finch 96; *Peckering v Kimpton* (1630) Toth 39; *Wintle v Carpenter* (1680) Cas *temp* Finch 462; *Rous v Barker* (1725) 4 Bro Parl Cas 660; *Willis v Parkinson* (1817) 2 Mer 507; *Clifton v Gwynne* (1822) Taml 236.

10 *Atkins v Hatton* (1794) 2 Anst 386; *Rayley v Best* (1830) 1 Russ & M 659.

11 *St Luke's, Old Street v St Leonard's, Shoreditch* (1779) 1 Bro CC 40.

12 *Marquis of Bute v Glamorganshire Canal Co* (1845) 1 Ph 681 at 684.

13 *Speer v Crawter* (1817) 2 Mer 410; *Miller v Warmington* (1820) 1 Jac & W 484; *O'Hara v Strange* (1847) 11 I Eq R 262; *Wake v Conyers* (1759) 1 Eden 331; *Duke of Leeds v Earl of Strafford* (1798) 4 Ves 180; *A-G v Fullerton* (1813) 2 Ves & B 263; *Rous v Barker* (1725) 4 Bro Parl Cas 660. Cf *Winterton v Lord Egremont* (circa 1785) cited in 2 Anst 392.

14 *Ambler's Case* (1770) cited in 4 Ves 184; *Wills v Parkinson* (1817) 2 Mer 507; *A-G v Stephens* (1855) 1 K & J 724 at 751; *Peckering v Kimpton* (1630) Toth 39.

15 See the Land Registration Act 2002 s 60; the Land Registration Rules 2003, SI 2003/1417, Pt 10 (rr 117-123); and BOUNDARIES; LAND REGISTRATION.

## UPDATE

### 466 Boundaries

NOTE 15--SI 2003/1417 r 119 amended: SI 2008/1919.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/N. PARTITION/467. Basis of equitable jurisdiction in partition.

## **N. PARTITION**

### **467. Basis of equitable jurisdiction in partition.**

From early times the former Court of Chancery assumed a concurrent jurisdiction in partition<sup>1</sup>. This was due partly to the inadequacy, and partly to the inconvenience, of the remedy at law<sup>2</sup>. The writ of partition at law was originally available only for parceners<sup>3</sup>; and, although it was made available for joint tenants and tenants in common of estates of inheritance<sup>4</sup>, and for joint tenants and tenants in common for lives or years<sup>5</sup>, the extension of the remedy did not meet the objection that the remedy itself was difficult to apply. Accordingly the court's jurisdiction was based not upon any equity but upon the principle of convenience<sup>6</sup>, and upon the extreme difficulty attending the process of partition at law<sup>7</sup>. When the writ of partition was abolished<sup>8</sup>, equity acquired technically, as before it had practically, exclusive jurisdiction in partition<sup>9</sup>.

A legal estate is not now capable of subsisting or of being created in an undivided share in land<sup>10</sup>, and undivided shares may be created behind a trust of land only<sup>11</sup>. Hence, where persons are beneficially entitled to land in undivided shares, the trustees in whom the legal estate in the entirety is vested are able to sell<sup>12</sup>. In general, there is no need to have recourse to the court even where partition is desired in lieu of a sale, as it is now provided<sup>13</sup> that the trustees of land<sup>14</sup> may, where beneficiaries of full age are absolutely entitled in undivided shares to land subject to the trust, partition the land, or any part of it, and provide, by way of mortgage or otherwise for the payment of any equality money. The trustees must, subject to obtaining the consent of each of the beneficiaries, give effect to any such partition by conveying the partitioned land in severalty, whether or not subject to any legal mortgage created for raising equality money, either absolutely or in trust, in accordance with the rights of those beneficiaries<sup>15</sup>. If a share in the land is absolutely vested in a minor the trustees may act on his behalf and retain land or other property representing his share in trust for him<sup>16</sup>. If the land has not become so vested, or in the event that a beneficiary refuses his consent or that the trustees are unwilling to partition the land on request, an application may be made to the court for an appropriate order<sup>17</sup>.

1 Co Litt 169a, Hargreave's note, referring to *Speke v Walrond* (1598) Toth 155. That learned writer seems to have regarded the jurisdiction as a usurpation: see 1 Fonblanque's Treatise of Equity (5th Edn, 1820) pp 18, 19n; Story, Equity Jurisprudence ss 646, 647. As to partition actions generally see REAL PROPERTY vol 39(2) (Reissue) PARA 215 et seq. As to the former Court of Chancery see PARAS 401-403 ante.

2 See Mitford, Pleadings in Chancery (5th Edn) 142.

3 Littleton's Tenures s 264. As to coparcenary see REAL PROPERTY vol 39(2) (Reissue) PARAS 224-226.

4 See 31 Hen 8 c 1 (Joint Tenants and Tenants in Common) (1539) (repealed).

5 See 32 Hen 8 c 32 (Joint Tenants for Life or Years) (1540) s 1 (repealed); *Baring v Nash* (1813) 1 Ves & B 551; *Miller v Warrington* (1820) 1 Jac & W 484 at 493.

6 *Calmdy v Calmdy* (1795) 2 Ves 568 at 570; *Strickland v Strickland* (1842) 6 Beav 77 at 81.

7 *Agar v Fairfax*, *Agar v Holdsworth* (1811) 17 Ves 533 at 552 per Lord Eldon LC; *Manaton v Squire* (1677) Freem Ch 26. As to leaseholds see *Baring v Nash* (1813) 1 Ves & B 551.

8 le by the Real Property Limitation Act 1833 s 36 (repealed).

9 *Leigh v Dickeson*(1884) 15 QBD 60 at 65, CA; *Mayfair Property Co v Johnston*[1894] 1 Ch 508 at 513.

10 Law of Property Act 1925 s 1(6): see REAL PROPERTY vol 39(2) (Reissue) PARAS 55, 207.

11 See *ibid* s 34(1); and the Settled Land Act 1925 s 36(4) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 2(11)(b)). Prior to the 1996 Act such undivided shares could only be created behind a trust for sale. See also REAL PROPERTY vol 39(2) (Reissue) PARAS 207, 211. As to land held at law or in equity in undivided shares on 1 January 1926 see the Law of Property Act 1925 s 39, Sch 1 Pt IV (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARAS 55-61.

12 For the purpose of exercising their functions as trustees, trustees of land have in relation to the land all the powers of an absolute owner: Trusts of Land and Appointment of Trustees Act 1996 s 6(1).

13 le by *ibid* s 7(1), replacing the Law of Property Act 1925 s 28(3), (4) (repealed). See REAL PROPERTY vol 39(2) (Reissue) PARA 223; and see *Re Brooker, Public Trustee v Young* [1934] Ch 610. The Trusts of Land and Appointment of Trustees Act 1996 s 7(1) is subject to the Commonhold and Leasehold Reform Act 2002 ss 21, 22 (see COMMONHOLD vol 13 (2009) PARAS 350-351); Trusts of Land and Appointment of Trustees Act 1996 s 7(6) (added by the Commonhold and Leasehold Reform Act 2002 s 68, Sch 5 para 8).

14 For the meaning of 'trustee of land' see REAL PROPERTY vol 39(2) (Reissue) PARA 66 note 7.

15 See the Trusts of Land and Appointment of Trustees Act 1996 s 7(2), (3); and REAL PROPERTY vol 39(2) (Reissue) PARA 223. As to land affected by an incumbrance see s 7(4).

16 See *ibid* s 7(5).

17 See *ibid* s 14; the Trustee Act 1925 s 57: *Re Thomas, Thomas v Thompson* [1930] 1 Ch 194; and TRUSTS vol 48 (2007 Reissue) PARA 1061. As to the procedure applying to claims to determine any question arising in the execution of a trust see CPR 64.1-64.4; *Practice Direction--Estates, Trusts and Charities* PD64A para 1-6; *Practice Direction--Applications to the Court for Directions by Trustees in Relation to the Administration of the Trust* PD64B; and as to the court's power to order the sale, partition etc of land see CPR 40.15-CPR40.16; *Practice Direction--1. Court's Powers in Relation to Land; 2. Conveyancing Counsel of the Court* PD40D paras 1.1-5.4; and CIVIL PROCEDURE vol 12 (2009) PARA 1215; SALE OF LAND.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(iv) The Concurrent Jurisdiction in Equity/O. DOWER/468. Equitable jurisdiction in dower.

## ***O. DOWER***

### **468. Equitable jurisdiction in dower.**

The former Court of Chancery exercised a jurisdiction in dower<sup>1</sup> concurrent with that at law.

<sup>1</sup> See REAL PROPERTY vol 39(2) (Reissue) PARA 161. Dower is abolished with regard to the real estate of every person dying after 31 December 1925: see the Administration of Estates Act 1925 s 45(1)(c); the Settled Land Act 1925 s 1(3). There may still be a right to dower as regards persons of unsound mind, who were of full age on 1 January 1926, dying possessed of realty without recovering testamentary capacity: see the Administration of Estates Act 1925 s 51(2) (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 161 note 4. It is, however, increasingly unlikely that any such person is in existence.

As to the former Court of Chancery see PARAS 401-403 ante.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/A. NATURE OF THE AUXILIARY JURISDICTION/469. Conditions of exercise of the auxiliary jurisdiction.

## **(v) The Auxiliary Jurisdiction in Equity**

### **A. NATURE OF THE AUXILIARY JURISDICTION**

#### **469. Conditions of exercise of the auxiliary jurisdiction.**

The former Court of Chancery exercised jurisdiction in aid of, or supplementary to, the jurisdiction at law<sup>1</sup> for the purpose of:

- 28 (1) procuring or preserving evidence;
- 29 (2) facilitating or restraining proceedings at law, as the justice of the case might require;
- 30 (3) restraining the assertion of doubtful rights;
- 31 (4) preventing instruments which were void or voidable from being a continuing source of peril;
- 32 (5) providing for the safety of property either pending litigation or when it was in the hands of accounting parties or limited owners;
- 33 (6) enforcing judgments obtained at law;
- 34 (7) preventing injury to third persons by the assertion of conflicting claims; and
- 35 (8) avoiding multiplicity of suits in respect of the same right.

Such jurisdiction was exercised by the following proceedings<sup>2</sup>:

- 36 (a) discovery<sup>3</sup>;
- 37 (b) perpetuation of testimony<sup>4</sup>;
- 38 (c) suits de bene esse, and commissions to take evidence abroad<sup>5</sup>;
- 39 (d) injunctions<sup>6</sup> and *quia timet* actions<sup>7</sup>;
- 40 (e) the cancellation and delivery up of documents<sup>8</sup>;
- 41 (f) the appointment of receivers<sup>9</sup>;
- 42 (g) interpleader<sup>10</sup>; and
- 43 (h) bills of peace<sup>11</sup>.

The use of injunctions to prevent the oppressive enforcement of judgments at law may for convenience be classified under this head of the jurisdiction, though in effect it constituted an overriding jurisdiction. The procedure in these matters was equally applicable when the rights in question were equitable, but in such a case the procedure was available in the principal suit.

1 As to the former Court of Chancery see PARAS 401-403 ante; and as to the categorisation of equitable jurisdiction as exclusive, concurrent and auxiliary see PARA 403 the text and note 3 ante.

2 The writ *ne exeat regno* (see PARA 495 post) is for convenience treated under this head although not strictly auxiliary to proceedings at law.

3 See PARAS 471-472 post. The modern term for 'discovery' is 'disclosure': see CIVIL PROCEDURE vol 11 (2009) PARA 538 et seq.

- 4 See PARA 474 post.
- 5 See PARA 475 post.
- 6 See PARA 477 et seq post.
- 7 See PARA 484 post.
- 8 See PARAS 485-486 post.
- 9 See PARAS 487-488 post.
- 10 See PARAS 489-491 post.
- 11 See PARA 493 post.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/A. NATURE OF THE AUXILIARY JURISDICTION/470. Relief dependent upon legal right.

#### **470. Relief dependent upon legal right.**

Where relief in equity depended upon a legal right, the former Court of Chancery usually referred the ascertainment of the right to a court of law<sup>1</sup>, and in such case the decision at law was binding in equity<sup>2</sup>; but even in matters purely equitable an issue at law might be directed, or the opinion of a court of law taken, and then the object was to inform the conscience of the court, and the decision at law was not binding<sup>3</sup>. In 1862 the Court of Chancery was empowered to determine questions of law or fact on which the title to equitable relief depended<sup>4</sup>, a power subsequently vested in each division of the High Court<sup>5</sup>. In matters of legal right, however, the principles of law still prevail<sup>6</sup>.

<sup>1</sup> *Rigby v Great Western Rly Co* (1846) 2 Ph 44 at 49-51. As to the former Court of Chancery see PARAS 401-403 ante.

<sup>2</sup> *Coker v Farewell* (1729) 1 Swan 390n. A right was not determined so as to be a ground for a perpetual injunction by one trial at law, except on an issue directed by the court: *Robinson v Lord Byron* (1788) 2 Cox Eq Cas 4. A verdict on such issue was not disturbed unless there was substantial ground for believing that, on a second trial, other weighty countervailing evidence would be produced: *Waters v Waters* (1848) 2 De G & Sm 591 at 618.

<sup>3</sup> *Coker v Farewell* (1729) 1 Swan 390n; *Marchioness of Lansdowne v Marquis of Lansdowne* (1820) 2 Bligh 60 at 86, HL.

<sup>4</sup> Repealed by the Chancery Regulation Act 1862 (Rolt's Act) (repealed).

<sup>5</sup> Repealed ultimately by the Supreme Court Act 1981: see PARAS 496-498 post.

<sup>6</sup> *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 188, HL. This has not, however, abrogated the jurisdiction to grant an injunction to restrain a threatened violation of a legal right (see PARA 484 post), such as the obstruction of ancient lights, if the obstruction, when completed, will be an actionable nuisance: *Litchfield-Speer v Queen Anne's Gate Syndicate (No 2) Ltd* [1919] 1 Ch 407.

#### **UPDATE**

#### **470 Relief dependent upon legal right**

NOTE 5--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/B. DISCLOSURE OF DOCUMENTS (FORMERLY DISCOVERY)/471. Assumption of jurisdiction.

## **B. DISCLOSURE OF DOCUMENTS (FORMERLY DISCOVERY)**

### **471. Assumption of jurisdiction.**

One of the defects in proceedings at law arose from the want of power to compel the parties to an action to give discovery of the material facts in controversy, and of the documents in their power relating to the subject matter of the action<sup>1</sup>. Jurisdiction to compel such discovery on the defendant's oath was assumed by equity<sup>2</sup>, and formed one of the foundations on which equitable jurisdiction rested. In certain cases, particularly in cases of account, accident, fraud and mistake, the former Court of Chancery, having acquired cognisance of the proceedings for the purpose of discovery, entertained the proceedings in their entirety and, in order to avoid multiplicity of suits, gave the substantial relief which was suitable<sup>3</sup>.

In a sense, every bill in equity was a bill of discovery, since it sought disclosure from the defendant on his oath of the truth of the circumstances constituting the plaintiff's case as stated in his bill; but a bill of discovery proper was one in which the plaintiff asked for no relief and simply sought discovery of facts within the defendant's knowledge or of documents in his power, which were necessary to maintain the plaintiff's rights in another court<sup>4</sup>. It followed from the nature of the bill that, when discovery had been obtained by the defendant's answer, there were no further proceedings<sup>5</sup>.

Discovery is now known as disclosure of documents<sup>6</sup>. The modern procedure is discussed below<sup>7</sup> and is dealt with in detail elsewhere in this work<sup>8</sup>.

1 3 Bl Com (14th Edn) 381-382; Story, Equity Jurisprudence s 1484; and see *Derby & Co Ltd v Weldon (No 7)* [1990] 3 All ER 161 at 181, [1990] 1 WLR 1156 at 1178.

2 As to the dangers of the system see 2 Fonblanque's Treatise of Equity (5th Edn, 1820) p 482; and as to bills for discovery see Bray, The Principles and Practice of Discovery (1885) pp 609-619. Disclosure of documents, formerly known as discovery, has long been obtainable in any division of the High Court: *Ramsden v Brearley* (1875) 33 LT 322; *Hillman's Airways Ltd v SA D'Editions Aéronautiques Internationales* [1934] 2 KB 356. See now CPR Pt 31; and CIVIL PROCEDURE Vol 11 (2009) PARA 538 et seq.

3 1 Fonblanque's Treatise of Equity (5th Edn, 1820) p 12n; and see *Jesus College v Bloom* (1745) 3 Atk 262. 'The right to the discovery carries with it the right to relief in equity': *Adley v Whitstable Co* (1810) 17 Ves 315 at 324 per Lord Eldon LC. 'When it is admitted that a party comes here properly for the discovery, the court is never disposed to occasion a multiplicity of suits, by making him go to a court of law for the relief': *Ryle v Haggie* (1820) 1 Jac & W 234 at 237 per Plumer MR. A further reason for giving relief as well as discovery was that the discovery would otherwise be in any event at the cost of the plaintiff (*Mackenzie v Johnston* (1819) 4 Madd 373 at 376), but the above dicta went beyond the actual practice; the necessity of coming into equity for discovery was only a circumstance to be regarded in deciding on the question of equitable jurisdiction to grant full relief (*Pearce v Creswick* (1843) 2 Hare 286 at 294).

Formerly, a solicitor, agent or arbitrator who was party to a fraud alleged in the proceedings was liable to be made a defendant, even though he obtained no benefit from the fraud, for the purposes of making him chargeable with the costs of the action and of discovery (*Marshall v Sladden* (1849) 7 Hare 428; *Gilbert v Lewis* (1862) 1 De GJ & Sm 38 at 52 per Lord Westbury; *Innes v Mitchell* (1857) 4 Drew 57 at 97; *Walsham v Stainton* (1863) 1 Hem & M 322 at 337, 338; *Weise v Wardle* (1874) LR 19 Eq 171; *Mathias v Yetts* (1882) 46 LT 497 at 502, CA) but this practice has long been obsolete (*Weise v Wardle* supra; *Mathias v Yetts* supra; *A-G v Bermondsey Vestry* (1883) 23 ChD 60 at 67, CA; *Burstall v Beyfus* (1884) 26 ChD 35 at 40, 41, CA).

As to the former Court of Chancery see PARAS 401-403 ante.

4 Mitford, Pleadings in Chancery (5th Edn, 1847) pp 64, 214-219; Story, Equity Jurisprudence ss 689, 1483. It has been pointed out that the true distinction was between bills for discovery only and bills for discovery and relief: Wigram, Law of Discovery (2nd Edn, 1840) p 46.

5 Mitford, Pleadings in Chancery (5th Edn, 1847) pp 17-18; *Lady Shaftesbury v Arrowsmith* (1798) 4 Ves 66 at 71.

6 See CIVIL PROCEDURE vol 11 (2009) PARA 538 et seq.

7 See PARA 473 post.

8 See CIVIL PROCEDURE vol 11 (2009) PARAS 111 et seq, 538 et seq.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/B. DISCLOSURE OF DOCUMENTS (FORMERLY DISCOVERY)/472. Circumstances in which discovery formerly lay and in which disclosure may now be ordered.

#### **472. Circumstances in which discovery formerly lay and in which disclosure may now be ordered.**

Formerly, to maintain a bill of discovery in equity it was in general necessary that an action at law should have been begun to which it could be auxiliary, or that it was intended to bring such an action<sup>1</sup>; and it was necessary also that it should clearly appear on the bill that the plaintiff had an interest in the subject matter of the discovery capable of assertion before a judicial tribunal<sup>2</sup>. The discovery of facts was, however, limited to the material facts relating to the plaintiff's case; it did not extend to the discovery of the defendant's evidence or to the means by which he intended to establish his case<sup>3</sup>. Discovery was allowed in aid of proceedings in equity, or of an action to maintain a civil right in a court of common law, but not to aid or defend an indictment, information, prohibition or mandamus<sup>4</sup>. It was not allowed against a purchaser for valuable consideration without notice<sup>5</sup>.

A series of House of Lords decisions<sup>6</sup> has been said to have given new life to the ancient bill of discovery in equity<sup>7</sup>. It is now well-established that under the modern disclosure jurisdiction there is no requirement that the person against whom the proceedings have been brought should be an actual wrongdoer who has committed a tort or breached a contract or committed some other civil or criminal wrongful act. Where a person, albeit innocently, and without incurring any personal liability, becomes involved in a wrongful act of another, that person thereby comes under a duty to assist the person injured by those acts by giving him any information which he is able to give that discloses the identity of the wrongdoer. While, therefore, the exercise of the jurisdiction does require that there should be wrongdoing, the wrongdoing which is required is the wrongdoing of the person whose identity the claimant is seeking to establish and not that of the person against whom the proceedings are brought<sup>8</sup>. It is not the case that disclosure can only be ordered to enable civil proceedings to be brought against the wrongdoer; if the victim of the wrongdoing is content that the wrongdoer should be prosecuted by the appropriate prosecuting authority there is no objection to his obtaining the identity of the wrongdoer by disclosure proceedings to enable that to happen<sup>9</sup>.

1 *London Corpn v Levy* (1803) 8 Ves 398 at 404; Story, Equity Jurisprudence s 1483.

2 Mitford, Pleadings in Chancery (5th Edn, 1847) pp 177-179, 183; *Brownsword v Edwards* (1751) 2 Ves Sen 243 at 247. In the modern procedure, the 'plaintiff' is known as the 'claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

3 See Wigram, Law of Discovery (2nd Edn, 1840) p 261.

4 *Lord Montague v Dudman* (1751) 2 Ves Sen 396 at 398. Orders of mandamus and prohibition are now known as mandatory orders and prohibiting orders: see CPR 51.1(2); and JUDICIAL REVIEW vol 61 (2010) PARAS 687, 693 et seq, 703 et seq.

5 See PARA 565 post.

6 Ie beginning with *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133, [1973] 2 All ER 943, HL; and most recently in *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29, [2002] 4 All ER 193, [2001] 1 WLR 2033, where their Lordships had also to consider the effect of the Contempt of Court Act 1981 s 10 and the Human Rights Act 1998 s 1(3), Sch 1 Pt I art 10 in relation to a claim for disclosure of journalists' sources. See further CIVIL PROCEDURE vol 11 (2009) PARAS 538 et seq, 576.

7 *British Steel Corpn v Granada Television Ltd* [1981] AC 1096 at 1171, [1981] 1 All ER 417 at 457, HL, per Lord Wilberforce, referring to the decision in *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133, [1973] 2 All ER 943, HL.

8 *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29, [2002] 4 All ER 193, [2001] 1 WLR 2033.

9 *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29, [2002] 4 All ER 193, [2001] 1 WLR 2033, disapproving dicta of Sedley J in *Financial Times Ltd v Interbrew SA* [2002] EWCA Civ 274, [2002] EMLR 446.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/B. DISCLOSURE OF DOCUMENTS (FORMERLY DISCOVERY)/473. The modern procedure.

### **473. The modern procedure.**

The Civil Procedure Rules (the 'CPR') refer to disclosure of documents, which is synonymous with discovery, and set out the modern rules<sup>1</sup>. The rules relating to disclosure before proceedings start<sup>2</sup> and disclosure against a person who is not a party to proceedings<sup>3</sup> do not, however, limit any other power which the court may have to order such disclosure<sup>4</sup>.

It has been held in a case where one party made serious allegations of fraud that that background, and a possible risk that evidence might be manufactured, did not justify a departure from the general programme of procedural rules in respect of disclosure<sup>5</sup>.

<sup>1</sup> See CPR Pt 31; *Practice Direction--Disclosure and Inspection* PD31; and CIVIL PROCEDURE vol 11 (2009) PARA 538 et seq.

<sup>2</sup> Ie CPR 31.16: see CIVIL PROCEDURE vol 11 (2009) PARA 112.

<sup>3</sup> Ie CPR 31.17: see CIVIL PROCEDURE vol 11 (2009) PARA 550.

<sup>4</sup> See CPR 31.18; and CIVIL PROCEDURE vol 11 (2009) PARAS 112, 550. As to other powers to order such disclosure see CIVIL PROCEDURE vol 11 (2009) PARAS 113, 550. As to witness summonses requiring a person to attend court to give evidence or produce a document see CIVIL PROCEDURE vol 11 (2009) PARA 1004 et seq.

<sup>5</sup> *Watford Petroleum Ltd v Interoil Trading SA* [2003] All ER (D) 175 (Sep), CA.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/C. PROCEEDINGS RELATING TO WITNESS TESTIMONY/474. Former suits to perpetuate testimony.

### **C. PROCEEDINGS RELATING TO WITNESS TESTIMONY**

#### **474. Former suits to perpetuate testimony.**

The former Court of Chancery entertained suits the sole object of which was to obtain and perpetuate testimony in danger of being lost before the matter to which it related could be made the subject of judicial investigation<sup>1</sup>. Hence it was in general essential for the maintenance of the suit that the plaintiff<sup>2</sup> was not able to institute proceedings to have the matter in controversy immediately determined; where, for instance, he was in enjoyment of a right, such as a right of fishery, and feared that it might in the future be contested<sup>3</sup>, or there was a defence to a claim under a valid instrument<sup>4</sup> such as a policy of insurance, but danger of the evidence for the defence being lost<sup>5</sup>; and it was also essential that the matter should not be the subject of an existing action or suit against the plaintiff<sup>6</sup>. If the matter was capable of immediate decision, the ground for the suit to perpetuate testimony failed<sup>7</sup>. The bill prayed for no relief but only for a commission for the examination of witnesses<sup>8</sup>, and it was terminated by the examination and never brought to a hearing<sup>9</sup>. There was no restriction as to age, health or otherwise on the witnesses who might be examined, the object being to preserve any available testimony which might be lost; but the depositions were sealed up, and used only if the witnesses were not alive or capable of giving oral evidence at the time of the trial<sup>10</sup>.

A suit to perpetuate testimony could be maintained in aid of any estate or interest in property, whether in possession or reversion, and whether vested or contingent<sup>11</sup>; but not in respect of a mere hope of succession or expectation of an interest<sup>12</sup>, nor of an interest which was liable to be immediately barred<sup>13</sup>. The procedure was extended to claims to titles, and was expressly applied by statute to estates and interests in property depending on any future event<sup>14</sup>. Any person who, under the circumstances alleged by him to exist, would have become entitled, upon the happening of any future event, to any honour, title, dignity or office, or to any estate or interest in any real or personal property, the right or claim to which could not be brought to trial by him before the happening of such event, could begin an action to perpetuate any testimony which might be material for establishing such right or claim<sup>15</sup>.

Proceedings to perpetuate testimony appear to have fallen entirely into disuse and can probably be regarded as obsolete<sup>16</sup>.

1 Story, Equity Jurisprudence s 1505. The procedure appears to have been most frequently used when a devisee of land in possession desired to preserve evidence of the validity of the will for use in the event of any future claim by the heir-at-law: 3 Bl Com (14th Edn) 449. The granting of an order perpetuating testimony was in the court's discretion: *Kelly v Kelly*[1917] 1 IR 51. The points to which the evidence was to be directed where deeds had been destroyed were: (1) the existence of the document before destruction; (2) its destruction; (3) its due execution; and (4) its contents: see *Shanahan v Shanahan*[1917] 1 IR 57 (deeds in solicitors' Dublin Office destroyed in the 1916 rising). As to the former Court of Chancery see PARAS 401-403 ante.

2 In modern civil proceedings, the 'plaintiff' is now generally known as the 'claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

3 *Duke of Dorset v Girdler* (1720) Prec Ch 531; *Angell v Angell* (1822) 1 Sim & St 83 at 89; *Brooking v Maudslay, Son and Field*(1888) 38 ChD 636 at 644; *West v Lord Sackville*[1903] 2 Ch 378 at 384, CA; Story, Equity Jurisprudence s 1508.

4 Where the instrument is void or voidable, it may be ordered to be delivered up and cancelled: see PARAS 485-486 post.

5 *Brooking v Maudslay, Son and Field*(1888) 38 ChD 636.

6 *Earl Spencer v Peek*(1867) LR 3 Eq 415.

7 *Ellice v Roupell* (1863) 32 Beav 299.

8 *Duke of Dorset v Girdler* (1720) Prec Ch 531; and see *Dew v Clarke* (1822) 1 Sim & St 108 at 110. The defendant was also entitled to examine witnesses: *Earl of Abergavenny v Powell* (1816) 1 Mer 434; *Skrine v Powell* (1845) 15 Sim 81.

9 Mitford, Pleadings in Chancery (5th Edn, 1847) pp 61-62.

10 *Earl Spencer v Peek*(1867) LR 3 Eq 415. Hence the depositions were not published while the witness was alive (*Barnsdale v Lowe* (1831) 2 Russ & M 142), unless he was unable to travel (*Morrison v Arnold* (1817) 19 Ves 670; *Biddulph v Lord Camoys* (1855) 20 Beav 402). See also *Beresford v A-G*[1918] P 33, CA; affd (1918) Times, 24 July, HL.

11 *Lord Dursley v Fitzhardinge Berkeley* (1801) 6 Ves 251.

12 *Smith v A-G* (1777) Rom 54; *Re Parsons, Stockley v Parsons*(1890) 45 ChD 51 at 57.

13 *Lord Dursley v Fitzhardinge Berkeley* (1801) 6 Ves 251. Hence issue in tail could not maintain the suit in the ancestor's lifetime: *Allan v Allan* (1808) 15 Ves 130.

14 Perpetuation of Testimony Act 1842 (repealed); and see *Townshend Peerage* (1843) 10 Cl & Fin 289; *Campbell v Earl of Dalhousie*(1869) LR 1 Sc & Div 462.

15 See the former RSC Ord 39 r 15(2) (revoked).

16 The former RSC Ord 39 r 15 has not been preserved in CPR Sch 1; and neither CPR Pt 32, which relates to written evidence generally, nor CPR Pt 34, which relates to examination out of court and depositions, specifically refers to proceedings to perpetuate testimony. See generally CIVIL PROCEDURE vol 11 (2009) PARA 989 et seq.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/C. PROCEEDINGS RELATING TO WITNESS TESTIMONY/475. Former suits de bene esse and for commissions.

#### **475. Former suits de bene esse and for commissions.**

Where an action at law had been begun and witnesses were too old or infirm to attend to give evidence, or where there was only a single witness as to a material point, the former Court of Chancery entertained a bill de bene esse to enable depositions to be taken immediately for use at the trial<sup>1</sup>; and, where the witnesses were abroad, it entertained a suit for a commission to examine them abroad, and restrained by injunction the proceedings at law until the return of the commission. This jurisdiction was said to be based on accident<sup>2</sup>. At law there was originally no power to issue such a commission; and, when the common law courts interfered, they did so only with the consent of the adverse party<sup>3</sup>. This interference did not lessen the jurisdiction in equity<sup>4</sup>. Depositions taken in a suit de bene esse could not be used unless, when the cause came on for trial, the attendance of the witness could not in fact then be procured<sup>5</sup>.

1 *Angell v Angell* (1822) 1 Sim & St 83; Story, Equity Jurisprudence s 1513. As to the former Court of Chancery see PARAS 401-403 ante.

2 In the accident of the witness being abroad: *Macaulay v Shackell* (1827) 1 Bli NS 96 at 119, 130-132, HL.

3 *Angell v Angell* (1822) 1 Sim & St 83.

4 *Macaulay v Shackell* (1827) 1 Bli NS 96 at 132, HL. It was held that an order for publication of the depositions in suits to perpetuate testimony and suits de bene esse ought not to be made unless the witnesses were dead or so ill or otherwise incapacitated as to be unable to attend at the hearing: see *Harris v Cotterell* (1808) 3 Mer 678; *Ellice v Roupell* (1863) 32 Beav 299 at 304; *Vane v Vane* (1876) 24 WR 565, CA; *Beresford v A-G* [1918] P 33, CA. Depositions taken de bene esse in an ancient suit were admitted in a modern suit where the issue in the two suits was the same and there was privity of estate between the parties to the two suits respectively: see *Llanover v Homfray*, *Phillips v Llanover* (1881) 19 ChD 224, CA; *Evans v Merthyr Tydfil UDC* [1899] 1 Ch 241, CA.

5 Story, Equity Jurisprudence s 1516.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/C. PROCEEDINGS RELATING TO WITNESS TESTIMONY/476. Taking of depositions; the modern practice.

#### **476. Taking of depositions; the modern practice.**

The court now has a general power to order evidence by deposition where this appears necessary for the purposes of justice<sup>1</sup>. The procedure for taking depositions is discussed elsewhere in this work<sup>2</sup>.

1 See CPR Pt 34.8; and CIVIL PROCEDURE vol 11 (2009) PARA 992.

2 See CIVIL PROCEDURE vol 11 (2009) PARA 992 et seq.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/D. INJUNCTIONS/(A) Historical Development of the Remedy by Injunction/477. Nature of injunctions.

## **D. INJUNCTIONS**

### **(A) HISTORICAL DEVELOPMENT OF THE REMEDY BY INJUNCTION**

#### **477. Nature of injunctions.**

The remedy by injunction<sup>1</sup> was one of the foundations of the jurisdiction in equity, and cannot be classed exclusively under either the exclusive, the concurrent or the auxiliary jurisdiction. One use of the remedy, indeed, added a fourth head of jurisdiction, since by means of injunctions the former Court of Chancery exercised in substance, though not in form, a jurisdiction to override judgments at common law when they were made the instrument of oppression<sup>2</sup>. Apart from this overriding jurisdiction, equity interfered in legal claims either to assist the prosecution of the claim or to prevent irreparable injury or multiplicity of suits. When it did not itself decide upon the legal claim, the jurisdiction was auxiliary; when it decided on the rights in the subject matter of the legal claim, the jurisdiction was concurrent; and when an injunction was granted in a trust or other matter of cognisance only in equity, the jurisdiction was exclusive.

For practical purposes, it is sufficient to regard injunctions as having been designed:

- 44 (1) to prevent the improper use of legal proceedings, or to remove technical impediments to their proper use; and
- 45 (2) to prevent the infringement of public or private rights, either temporarily before the right had been ascertained, or permanently after it had been ascertained.

An injunction was at one time granted only in negative terms, but the practice in this respect has long since been altered, and an injunction may now be mandatory in terms, as well as in substance<sup>3</sup>.

<sup>1</sup> See CIVIL PROCEDURE vol 11 (2009) PARA 331 et seq. As to interim injunctions see CIVIL PROCEDURE vol 11 (2009) PARAS 383-395.

<sup>2</sup> Thus, where a judgment was obtained against conscience, equity would decree the party to acknowledge satisfaction, though he had received nothing; and, if a fine had been obtained by fraud, equity would decree the party to be a trustee: *Barnesly v Powel* (1748) 1 Ves Sen 119; *Barnesly v Powel* (1749) 1 Ves Sen 284; and see *Baker v Beaumont* (1663) 3 Rep Ch 7. As to the former Court of Chancery see PARAS 401-403 ante.

<sup>3</sup> *Jackson v Normandy Brick Co* [1899] 1 Ch 438, CA; and see CIVIL PROCEDURE vol 11 (2009) PARA 376 et seq.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/D. INJUNCTIONS/(A) Historical Development of the Remedy by Injunction/478. Former interference by injunction in proceedings.

#### **478. Former interference by injunction in proceedings.**

The practical importance of the grant of an injunction to prevent the improper use of legal proceedings, or to remove technical impediments to their proper use, disappeared with the fusion of the administration of law and equity<sup>1</sup>. One of the reasons for the growth of equity being the necessity for correcting the strictness of the law, it was inevitable that equity should have the power to prevent the plaintiff at law from profiting by that strictness, and this it did by forbidding him to proceed on his legal judgment. Equity did not, however, impugn the legal judgment as such; it recognised the judgment, but prevented its unconscientious use<sup>2</sup>.

The same principle enabled the former Court of Chancery to remove technical impediments to the prosecution of an action at law, as by preventing an outstanding term from being set up against a claim in ejectment<sup>3</sup>, and to prevent the prosecution of legal claims where they conflicted with the procedure or principles of equity<sup>4</sup>.

1 See the Supreme Court Act 1981 s 49; and PARA 499 post.

2 *Earl of Oxford's Case* (1615) 21 ER 485; *Bushby v Munday* (1821) 5 Madd 297 at 307.

3 Mitford, Pleadings in Chancery (5th Edn, 1847) pp 156-157. As to the former Court of Chancery see PARAS 401-403 ante.

4 Equity did not interfere directly with other courts, but acted on the defendant in equity by punishing him for his contempt in disobeying its own decree: *Bushby v Munday* (1821) 5 Madd 297 at 307.

#### **UPDATE**

#### **478 Former interference by injunction in proceedings**

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/D. INJUNCTIONS/(A) Historical Development of the Remedy by Injunction/479. Restraining proceedings at law.

#### **479. Restraining proceedings at law.**

Where an estate had fallen within the cognisance of the former Court of Chancery by the making of an administration decree, proceedings at law were restrained<sup>1</sup>; and in numerous cases the application of equitable doctrines required that parties should be restrained from enforcing their strict legal rights<sup>2</sup>. Examples are furnished by the principles applicable in cases of fraud<sup>3</sup>, of representation<sup>4</sup>, of standing by<sup>5</sup>, of accident<sup>6</sup>, of marshalling assets and securities, of suretyship<sup>7</sup>, and generally where it was necessary to make an equitable title prevail over a legal right<sup>8</sup>, and the reason which gave the equitable title was not available at law<sup>9</sup>; or where it was necessary to delay proceedings at law until after discovery or the examination of witnesses abroad<sup>10</sup>.

In matters of concurrent jurisdiction the Court of Chancery did not usually restrain proceedings in other courts. This was done only where, for some special reason, it was necessary to resort to equity, for example, to obtain discovery or to secure protection for minors<sup>11</sup>. Equity did not claim jurisdiction to retry matters which had been the subject of investigation at law in the ordinary way; thus a judgment at law was not interfered with merely on the ground of its being incorrect or of an omission to raise a particular defence<sup>12</sup>. Relief was granted, however, where a receipt was discovered after judgment for a debt<sup>13</sup>; and, since equity, in restraining proceedings in other courts, acted in personam, it could grant an injunction against proceedings in a foreign court where the claim was unconscientious<sup>14</sup>.

1 See *Perry v Phelps* (1804) 10 Ves 34; and PARA 460 ante. As to the former Court of Chancery see PARAS 401-403 ante.

2 Story, Equity Jurisprudence s 584.

3 See *Lloyd v Clark* (1843) 6 Beav 309.

4 Ie where the defendant is bound on equitable grounds to make good a representation as to existing facts: *Piggott v Stratton* (1859) 1 De GF & J 33; and see *Jorden v Money* (1854) 5 HL Cas 185.

5 *Nicholson v Hooper* (1838) 4 My & Cr 179.

6 Eg where an executor lost assets through destruction by fire, but remained liable at law to creditors: *Lady Croft's Executors v Lyndsey and Covill* (1676) Freem Ch 1; and see *Crosse v Smith* (1806) 7 East 246 at 258. Now both at law and in equity an executor cannot be charged for loss of assets without wilful default: *Job v Job* (1877) 6 ChD 562; and see PARA 448 ante.

7 Story, Equity Jurisprudence s 883; and see *Clarke v Henty* (1838) 3 Y & C Ex 187.

8 *Newlands v Paynter* (1840) 4 My & Cr 408; and see *Langton v Horton* (1841) 3 Beav 464.

9 *Harrison v Nettleship* (1833) 2 My & K 423. Proceedings in equity might be restrained so as to compel interpleader: *Prudential Assurance Co v Thomas* (1867) 3 Ch App 74.

10 See *Goldschmidt v Marryat* (1809) 1 Camp 559.

11 *Rotherham v Fanshaw* (1748) 3 Atk 628.

12 *Bateman v Willoe* (1803) 1 Sch & Lef 201; *Protheroe v Forman* (1818) 2 Swan 227 at 232; Mitford, *Pleadings in Chancery* (5th Edn, 1847) pp 153-154.

13 *Countess of Gainsborough v Gifford* (1727) 2 P Wms 424 at 426.

14 *Lord Portarlington v Soulby* (1834) 3 My & K 104, overruling *Lowe v Baker* (1665) Freem Ch 125; and see *Carron Iron Co v Maclaren* (1855) 5 HL Cas 416 at 439; *Hope v Carnegie* (1866) 1 Ch App 320; and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 396.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/D. INJUNCTIONS/(A) Historical Development of the Remedy by Injunction/480. Loss of legal remedy through interference of equity.

#### **480. Loss of legal remedy through interference of equity.**

Where a defendant had lost his legal remedy in consequence of a restraint put upon him in equity, the former Court of Chancery gave him a remedy equivalent to that which he had lost<sup>1</sup>; and, although a plaintiff suing on a bond would not usually, either at law or in equity<sup>2</sup>, recover in respect of principal and interest beyond the amount of the penalty, yet he was allowed to do so if he had been restrained from suing while the amount due was less than the penalty<sup>3</sup>. As regards accounts of rents and profits<sup>4</sup>, and interest<sup>5</sup>, he was saved from any statutory bar which the delay had created.

1 *Brown v Newall* (1837) 2 My & Cr 558 at 572; and see *Bond v Hopkins* (1802) 1 Sch & Lef 413.

2 *Clarke v Seton* (1801) 6 Ves 411. As to the former Court of Chancery see PARAS 401-403 ante.

3 *Duvall v Terry* (1694) Show Parl Cas 15; *Grant v Grant* (1827) 3 Russ 598 at 607.

4 *Pulteney v Warren* (1801) 6 Ves 73.

5 *Hull and Selby Rly Co v North-Eastern Rly Co* (1854) 5 De GM & G 872.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/D. INJUNCTIONS/(A) Historical Development of the Remedy by Injunction/481. Injunction restraining infringement of rights.

## **481. Injunction restraining infringement of rights.**

Under the procedure of the former Court of Chancery an injunction could in certain circumstances be obtained to restrain the infringement of public or private rights, but it was essential that the injunction should be specifically asked for by the bill<sup>1</sup>, this being an exception to the efficacy of a general prayer for relief<sup>2</sup>.

Injunctions to prevent the infringement of rights were granted in cases of waste, public and private nuisance, trespass, interference with easements and infringements of patents and copyright, and of negative stipulations in contracts<sup>3</sup>. In cases of waste equity interfered in aid of legal rights on the ground of the inadequacy of the remedy at law<sup>4</sup>, and it extended the remedy by injunction both to cases of legal titles where there was no remedy at law and to cases where the waste, under the name of equitable waste, was recognised only in equity<sup>5</sup>. In cases of public<sup>6</sup> and private nuisance and of trespass<sup>7</sup> equity originally interfered either to prevent a multiplicity of suits or to prevent irreparable injury<sup>8</sup>. The recurrent nature of the damage would have necessitated continual litigation if the wrongful act could not be stopped by injunction<sup>9</sup>. Apart from this the plaintiff was entitled to an injunction if the injury would be irreparable, that is to say if he could not be adequately compensated in damages<sup>10</sup>, and this latter reason was the ground of the jurisdiction as regards interference with easements, such as rights of light, and infringements of patents and copyrights.

In relation to matters of contract equity interfered by injunction to enforce the observance of agreements which were in substance negative<sup>11</sup>.

1 *Savory v Dyer* (1749) Amb 70; and see *Grimes v French* (1740) 2 Atk 141. The bill was the originating process. As to the commencement of proceedings see now CIVIL PROCEDURE vol 11 (2009) PARA 116 et seq. As to the former Court of Chancery see PARAS 401-403 ante.

2 See *Cook v Martyn* (1737) 2 Atk 2; *Dormer v Fortescue* (1744) 3 Atk 124 at 132; *Manaton v Molesworth* (1757) 1 Eden 18 at 26.

3 Save in cases of contract, the right to an injunction depended on proprietary rights: see *Baird v Wells* (1890) 44 ChD 661, CA. A libel was not restrained by the Court of Chancery, apparently because a libel was a crime, and it did not interfere in regard to crimes by injunction: *Gee v Pritchard* (1818) 2 Swan 402 at 413. As to the jurisdiction to restrain the publication of a libel or the making of a slanderous statement see LIBEL AND SLANDER vol 28 (Reissue) PARAS 170 et seq, 271.

4 As to the remedy at law see *Jefferson v Bishop of Durham* (1797) 1 Bos & P 105.

5 Mitford, Pleadings in Chancery (5th Edn, 1847) pp 162-164; Story, Equity Jurisprudence ss 913-914; *Garth v Cotton* (1753) 1 Ves Sen 524 at 555-556 (legal remedy not applicable); *Vane v Lord Barnard* (1716) 2 Vern 738; *Morris v Morris* (1847) 15 Sim 505 (equitable waste).

6 As to the jurisdiction in case of public nuisances see *A-G v Cleaver* (1811) 18 Ves 211 at 217; CIVIL PROCEDURE vol 11 (2009) PARA 492; NUISANCE vol 78 (2010) PARA 129.

7 Injunction against trespass was a late development of equity; originally the party was left to his action at law (see *Mogg v Mogg* (1786) 2 Dick 670; *Mortimer v Cottrell* (1789) 2 Cox Eq Cas 205), unless the trespass was repeated (*Weller v Smeaton* (1784) 1 Bro CC 572; Story, Equity Jurisprudence s 928). See also *Lowndes v Bettie* (1864) 33 LJ Ch 451.

8 See *Welby v Duke of Rutland* (1773) 2 Bro Parl Cas 39.

9 See *Broadbent v Imperial Gas Co* (1857) 7 De GM & G 436 at 462; on appeal sub nom *Directors of Imperial Gas Co v Broadbent* (1859) 7 HL Cas 600.

10 *A-G v Nichol* (1809) 16 Ves 338; *Wynstanley v Lee* (1818) 2 Swan 333.

11 *Martin v Nutkin* (1724) 2 P Wms 266; *Barret v Blagrove* (1800) 5 Ves 555; *Catt v Tourle* (1869) 4 Ch App 654; *Metropolitan Electric Supply Co Ltd v Ginder* [1901] 2 Ch 799. This is equivalent to specific performance: see *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 All ER 954 at 956, [1974] 1 WLR 576 at 578.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/D. INJUNCTIONS/(A) Historical Development of the Remedy by Injunction/482. Obligation to establish legal right.

## **482. Obligation to establish legal right.**

In all matters where injunctions might be granted, the general rule was that the plaintiff in equity must have established his right at law before he could be entitled to an injunction<sup>1</sup>; and an injunction was not granted before this was done if the plaintiff could be sufficiently protected by directing the defendant to keep an account<sup>2</sup>.

An injunction might, however, be granted before answer, and before the title was established at law, if the result of the defendant's conduct would be to inflict irreparable injury on the plaintiff<sup>3</sup>. Although every branch of the High Court now has all the jurisdiction of the former Court of Chancery and the several courts of law<sup>4</sup>, yet, so far as the right in question is a legal right, the court in the exercise of its jurisdiction must be guided by the principles established at law<sup>5</sup>. Equity normally granted an interlocutory (interim) injunction only on an undertaking as to damages<sup>6</sup>.

1 *Whitchurch v Hide* (1742) 2 Atk 391; *Bacon v Spottiswoode*, *Bacon v Jones* (1839) 4 My & Cr 433; *Directors of Imperial Gas Light and Coke Co v Broadbent* (1859) 7 HL Cas 600 at 612; *Cardiff Corp v Cardiff Waterworks Co* (1859) 4 De G & J 596 at 599, CA. As to relaxations of this rule see Ashburner, *Principles of Equity* (2nd Edn, 1933) p 6; and as to the later extension of the auxiliary jurisdiction see pp 8-9. The former Court of Chancery was empowered to determine legal questions on which equitable relief depended: see PARA 470 ante. As to the former Court of Chancery see PARAS 401-403 ante.

2 *Cory v Yarmouth and Norwich Rly Co* (1844) 3 Hare 593; *Spottiswoode v Clark* (1846) 2 Ph 154; *Rigby v Great Western Rly Co* (1846) 2 Ph 44; subsequent proceedings (1849) 19 LJ Ch 470.

3 Immediate injunctions were granted in plain cases of waste (*Anon* (1750) 1 Ves Sen 476) or nuisance (*A-G v Doughty* (1752) 2 Ves Sen 453); and see *Rushmer v Polsue and Alfieri Ltd* [1906] 1 Ch 234, CA; affd upon the facts sub nom *Polsue and Alfieri Ltd v Rushmer* [1907] AC 121, HL.

4 Power to grant injunctions was given to the court of common law by the Common Law Procedure Act 1854 (repealed), and now all divisions of the High Court may by order, whether interim or final, grant an injunction in all cases in which it appears to the court to be just and convenient to do so: see the Supreme Court Act 1981 s 37(1); and PARA 483 post. As to injunctions in county courts see COURTS vol 10 (Reissue) PARA 711. As to the power to grant damages in lieu of an injunction see CIVIL PROCEDURE vol 11 (2009) PARA 364 et seq.

5 *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 188, HL.

6 *Chappell v Davidson* (1856) 8 De GM & G 1. As to undertakings as to damages see CIVIL PROCEDURE vol 11 (2009) PARA 419 et seq.

## **UPDATE**

### **482 Obligation to establish legal right**

NOTE 4--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/D. INJUNCTIONS/(B) The Modern Practice/483. Injunctions; the modern practice.

## (B) THE MODERN PRACTICE

### **483. Injunctions; the modern practice.**

The High Court may by order, whether interim<sup>1</sup> or final, grant an injunction in all cases in which it appears to the court to be just and convenient to do so<sup>2</sup>. Any such order may be made either unconditionally or on such terms and conditions as the court thinks just<sup>3</sup>. The procedure on granting injunctions and the circumstances in which they may be granted are discussed in detail elsewhere in this work<sup>4</sup>.

Where a party seeks an injunction restraining the government from implementing a European Community directive pending a challenge to its validity, the court must apply the principles governing interim relief to be found in Community jurisprudence. Those principles establish that such interim relief can only be granted if the validity of the Community directive is seriously in doubt, and that the grant of such relief is necessary to avoid serious and irreparable damage to the applicant. Purely financial damage is not regarded in principle as irreparable<sup>5</sup>.

<sup>1</sup> The statutory wording is 'interlocutory', but the term now used in CPR Pt 25 is 'interim': see CIVIL PROCEDURE vol 11 (2009) PARA 316.

<sup>2</sup> Supreme Court Act 1981 s 37(1). As to injunctions in county courts see COURTS vol 10 (Reissue) PARA 711. As to the power to grant damages in lieu of an injunction see CIVIL PROCEDURE vol 11 (2009) PARA 364 et seq. See also PARA 482 the text and notes 4-6 ante.

<sup>3</sup> Ibid s 37(2).

<sup>4</sup> See generally CIVIL PROCEDURE vol 11 (2009) PARA 331 et seq. As to interim injunctions see CIVIL PROCEDURE vol 11 (2009) PARA 316.

<sup>5</sup> *R v Secretary of State for Health, ex p Imperial Tobacco Ltd* [2002] QB 161, [2000] 1 All ER 572, CA; no order made on appeal [2001] 1 All ER 850, [2001] 1 WLR 127, HL.

## **UPDATE**

### **483 Injunctions; the modern practice**

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force on 1 October 2009: SI 2009/1604).



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/E. PROTECTION AGAINST FUTURE APPREHENDED LOSS/484. Protection against future apprehended loss (*quia timet* action).

## **E. PROTECTION AGAINST FUTURE APPREHENDED LOSS**

### **484. Protection against future apprehended loss (*quia timet* action).**

It was recognised at common law that a person was entitled to be protected against unlawful disturbance of his rights and against vexatious litigation, and remedies in this respect were given by certain writs of prevention<sup>1</sup>. To some extent the remedy in equity by injunction and by the appointment of a receiver had the same object, but in addition to these remedies a plaintiff might maintain a suit *quia timet* in order to secure himself against a future apprehended loss<sup>2</sup>.

Thus a surety might file a bill<sup>3</sup> to compel the debtor on a bond in which he was joined to pay the debt when due, whether the surety had been actually sued for it or not; and upon a covenant of indemnity a bill might be filed to relieve the covenantee under similar circumstances<sup>4</sup>.

A bill *quia timet* might also be filed to secure property which was not transferable or payable to the plaintiff until a future date, as in the case of a future legacy<sup>5</sup> or a future interest in personal property<sup>6</sup>; but, where under covenant money was payable at some future time, the court did not interfere unless the covenantor had in some way placed the future payment in hazard<sup>7</sup>. Where an annual charge on land had to be kept down by a tenant for life, the reversioner might bring a bill *quia timet* to compel payment of arrears<sup>8</sup>.

Injunctions to protect against future apprehended loss are now routinely granted when the appropriate circumstances are made out<sup>9</sup>.

1 Co Litt 100a.

2 A *quia timet* action was a procedure by which the court prevented its jurisdiction from being stultified: *Re Anderson-Berry, Harris v Griffith* [1928] Ch 290 at 306, CA; and see *Graigola Merthyr Co Ltd v Swansea Corp* [1928] Ch 235, CA; affd [1929] AC 344, HL. Relief of the nature of that previously obtainable in a suit *quia timet* is still afforded by the granting of an injunction or the appointment of a receiver; and, where a claimant (previously known as a 'plaintiff': see CIVIL PROCEDURE vol 11 (2009) PARA 18) is entitled to indemnity, whether as surety or under a contract of indemnity, he may file a claim under CPR Pt 20: see CIVIL PROCEDURE vol 11 (2009) PARA 618 et seq.

3 The bill was the originating process. As to the commencement of proceedings see now CIVIL PROCEDURE vol 11 (2009) PARA 116 et seq.

4 Mitford, Pleadings in Chancery (5th Edn, 1847) p 171; *Earl of Ranelagh v Hayes* (1683) 1 Vern 189; *Nisbet v Smith* (1789) 2 Bro CC 579; *Wooldridge v Norris* (1868) LR 6 Eq 410; and see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1013 et seq.

5 *Johnson v Mills* (1749) 1 Ves Sen 282; *Green v Pigot* (1781) 1 Bro CC 103; and see *Brown v Dudbridge* (1788) 2 Bro CC 321.

6 As to such interests see 1 Eq Cas Abr 360 pl 4; 1 Fearn's Contingent Remainders (10th Edn, 1844) pp 401-415.

7 *Flight v Cook* (1755) 2 Ves Sen 619.

8 *Hayes v Hayes* (1674) 1 Cas in Ch 223.

9 See CIVIL PROCEDURE vol 11 (2009) PARAS 362, 365, 367.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/F. DELIVERY UP AND CANCELLATION OF DOCUMENTS/485. Instruments voidable for fraud etc.

## **F. DELIVERY UP AND CANCELLATION OF DOCUMENTS**

### **485. Instruments voidable for fraud etc.**

Where the circumstances in which a document, whether a contract (including a negotiable instrument) or conveyance, has been obtained are such as to make it void or voidable<sup>1</sup>, one party to the transaction may be entitled to have it rescinded or set aside and the document delivered up to be cancelled<sup>2</sup>. In cases of actual fraud the party defrauded may, under the fundamental jurisdiction of equity, maintain a claim for this purpose; and in cases of constructive fraud, that is to say where, on the ground of undue influence, unconscionable bargain, public policy or otherwise, it is inequitable that the transaction should be allowed to stand, the party complaining of the transaction is entitled to be relieved against it in equity, and, as incidental to the relief, the document which is impeached may be ordered to be delivered up<sup>3</sup>.

In such cases the claimant has a right to equitable relief which he may assert at any time provided that:

- 46 (1) he is not guilty of unconscionable delay ('laches')<sup>4</sup>;
- 47 (2) he has not disqualified himself from suing by his own participation in the transaction<sup>5</sup>; and
- 48 (3) he submits to any equitable terms which may be imposed upon him by the court<sup>6</sup>.

An agreement will not be ordered to be delivered up merely because it is unenforceable. To justify this remedy either there must be fraud in obtaining it or it must form a cloud upon the title to land<sup>7</sup>.

1 Where an instrument was neither void nor voidable, but a party had a good legal defence to any claim which might be made upon it, the proper remedy was not an action to have the instrument delivered up to be cancelled, but an action to perpetuate the testimony necessary for the defence: *Brooking v Maudslay, Son and Field*(1888) 38 ChD 636; not following the dictum in *Cooper v Joel* (1859) 27 Beav 313 at 317 that 'if there be a good legal defence, not appearing on the instrument itself which the lapse of time may cause the person chargeable on the instrument, from loss of the evidence necessary for his defence at law, to be unable to make available, then this court will interfere and order the instrument to be delivered up to be cancelled'; and which Lord Campbell LC on the appeal considered to go too far (*Cooper v Joel* (1859) 1 De GF & J 240, CA). Suits to perpetuate testimony are now thought to be obsolete: see PARA 474 ante.

2 For a discussion of the effect of physical cancellation see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 76 et seq.

3 *Duncan v Worrall* (1822) 10 Price 31 at 42; *Brooking v Maudslay, Son and Field*(1888) 38 ChD 636 at 643; Story, Equity Jurisprudence s 695; and see *Thornton v Knight* (1849) 16 Sim 509; *Williams v Bayley*(1866) LR 1 HL 200.

4 As to laches see PARA 910 et seq post.

5 *Franco v Bolton* (1797) 3 Ves 368; and see PARA 560 note 16 post.

6 See PARA 558 post.

7     *Onions v Cohen* (1865) 2 Hem & M 354; and see *Brooking v Maudslay, Son and Field*(1888) 38 ChD 636;  
*Hilton v Barrow* (1791) 1 Ves 283.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/F. DELIVERY UP AND CANCELLATION OF DOCUMENTS/486. Instruments void at law.

#### 486. Instruments void at law.

Where a transaction is void at law because it is founded on an illegal consideration or otherwise, and the defect appears on the face of the instrument, equity does not interfere to order the instrument to be cancelled<sup>1</sup>. Where the defect does not appear on the face of the instrument, however, the party desiring to defeat it is not bound to wait until it is used against him but may anticipate this danger and institute proceedings to have the instrument delivered up to be cancelled<sup>2</sup>; and, upon the cancellation, he will be put upon equitable terms to repay money provided by the other party<sup>3</sup>.

In cases of illegal consideration the claimant will not be debarred from relief on the ground that he was a participant in the wrongdoing if the transaction is such that, on grounds of public policy, it ought not to stand<sup>4</sup>.

<sup>1</sup> *Simpson v Lord Howden* (1837) 3 My & Cr 97; and see *Gray v Mathias* (1800) 5 Ves 286; *Hoare v Bremridge* (1872) 8 Ch App 22 at 26, CA.

<sup>2</sup> As to negotiable instruments see *Bishop of Winchester v Fournier* (1752) 2 Ves Sen 445; *Bromley v Holland, Tyrrell and Oakden* (1802) 7 Ves 3 at 20; *Jervis v White* (1802) 7 Ves 413; *Wynne v Callander* (1826) 1 Russ 293; as to a deed which might form a cloud upon title to land see *Hayward v Dimsdale* (1810) 17 Ves 111; *Bromley v Holland, Tyrrell and Oakden* supra at 21; as to forged instruments see *Peake v Highfield* (1826) 1 Russ 559; and as to insurance policies see *Bromley v Holland, Tyrrell and Oakden* supra; *Kemp v Pryor* (1802) 7 Ves 237 at 249. It was at one time doubtful whether equity would interfere to order delivery up of an instrument which was void at law (*Ryan v Mackmath* (1789) 3 Bro CC 15), but the doubt has long been removed and delivery up was ordered (see *Ryan v Mackmath* supra at 18 note (a); *Davis v Duke of Marlborough* (1819) 2 Swan 108 at 157 note (b); Story, Equity Jurisprudence s 700).

<sup>3</sup> *Lodge v National Union Investment Co Ltd* [1907] 1 Ch 300 (but see *Kasuma v Baba-Egbe* [1956] AC 539, [1956] 3 All ER 266, PC); *Barclay v Prospect Mortgages Ltd* [1974] 2 All ER 672, [1974] 1 WLR 837 (and see *Chapman v Michaelson* [1909] 1 Ch 238 (claim for a declaration on similar facts)).

As to the adjustment of payments by either party on setting aside an annuity deed which was void for non-compliance with the statutory requirements relating to registration see *Byne v Vivian* (1800) 5 Ves 604; *Bromley v Holland, Tyrrell and Oakden* (1802) 7 Ves 3; *Holbrook v Sharpey* (1812) 19 Ves 131; *Davis v Duke of Marlborough* (1819) 2 Swan 108. Where a lease by charity trustees is set aside as improper, it is set aside in its entirety, and the trustees' personal covenants are not preserved for the tenant's benefit: *A-G v Morgan* (1826) 2 Russ 306.

<sup>4</sup> *W-- v B--* (1863) 32 Beav 574; and see *Lord St John v Lady St John* (1803) 11 Ves 526 at 535. This applies equally in the case of instruments given in gambling transactions: *Wynne v Callander* (1826) 1 Russ 293; *Earl of Milltown v Stewart* (1837) 3 My & Cr 18 at 25; cf *Ayerst v Jenkins* (1873) LR 16 Eq 275 at 282, CA. Illegality of consideration is not necessarily a ground for setting aside a settlement where there has been an actual transfer of property: *Ayerst v Jenkins* supra; but see *Phillips v Probyn* [1899] 1 Ch 811.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/G. RECEIVERS/487. Appointment of receivers.

## **G. RECEIVERS**

### **487. Appointment of receivers.**

Equity exercised jurisdiction to preserve property in the interest of those entitled to it, either because it was in the hands of limited owners, trustees or other accountable persons and was in danger of being lost, or because the right to it was the subject of pending litigation. In such cases courts of equity interfered, either by the appointment of a receiver to receive rents or other income, or by an order to pay a pecuniary fund into court, or by directing security to be given or money to be paid over, or by the mere granting of an injunction or other remedial process, thus adapting the relief to the precise nature of the particular case and the remedial justice required by it<sup>1</sup>.

Apart from orders for payment into court, a remedy specially applicable in the case of trustees and personal representatives, the jurisdiction to preserve property was usually exercised by the appointment of a receiver, and the former Court of Chancery also appointed receivers for the purpose of enforcing equitable securities and of giving effect to judgments at law where the judgment creditor's remedy was hindered by a prior legal interest<sup>2</sup>.

The court may now appoint a receiver if it is just and convenient to do so<sup>3</sup>; and it interferes more readily than formerly in favour of a legal title<sup>4</sup>. The appointment of a receiver is for the benefit of the person ultimately found to be entitled, and does not at all affect the right<sup>5</sup>. When the receiver is in possession, he cannot be interfered with without the leave of the court, even by beginning a claim for possession<sup>6</sup>.

1 Story, Equity Jurisprudence s 826.

2 As to receivers generally see RECEIVERS; and as to receivers by way of equitable execution see PARA 488 post; and CIVIL PROCEDURE VOL 12 (2009) PARA 1497 et seq. As to the former Court of Chancery see PARAS 401-403 ante.

As regards the preservation of personal property pending litigation, the court readily appointed a receiver where no one was in lawful possession, as where litigation was pending in the ecclesiastical court with respect to the right to probate or administration: *Owen and Gutch v Homan* (1853) 4 HL Cas 997 at 1032 per Lord Cranworth LC ('Where ... the property is as it were *in medio*, in the enjoyment of no one, the court can hardly do wrong in taking possession. It is in the common interest of all parties that the court should prevent a scramble'); and see *Rendall v Rendall* (1841) 1 Hare 152. Where, however, the defendant was in possession, the court exercised a discretion according to the circumstances of the case: *Owen and Gutch v Homan* supra at 1032-1033 per Lord Cranworth LC.

As regards real property, if the plaintiff was claiming land under a legal title, the court did not interfere with the person in possession by appointing a receiver of the rents and profits unless there was some matter, such as fraud, affecting the defendant's conscience (*Earl Talbot v Hope Scott* (1858) 4 K & J 96 at 112, 114) or unless the court could see a reasonable probability that the plaintiff would ultimately succeed (*Bainbrigge v Baddeley* (1851) 3 Mac & G 413 at 420). Even if no one was in receipt of rents from the tenants, the court would not interfere in favour of a legal title supported by no special equity: *Carrow v Ferrior*, *Dunn v Ferrior* (1868) 3 Ch App 719 at 728.

As regards the enforcement of securities by the appointment of a receiver, the Court of Chancery did not, except under special circumstances (*Ackland v Gravenor* (1862) 31 Beav 482; and see *Fripp v Chard Rly Co* (1853) 11 Hare 241), act at the instance of a mortgagee having the legal estate, since he was sufficiently protected by his right to take possession under his legal title; but taking possession is burdensome, and since the Judicature Acts it has been the usual practice to appoint a receiver at the instance of a legal mortgagee

(*Tillett v Nixon*(1883) 25 ChD 238; *Re Pope*(1886) 17 QBD 743 at 749, CA; *Re Prytherch, Prytherch v Williams*(1889) 42 ChD 590). If the legal mortgagee was not in possession, an appointment might be made at the instance of a subsequent incumbrancer, but subject to the legal mortgagee's right to possession: *Berney v Sewell* (1820) 1 Jac & W 647; *Norway v Rowe* (1812) 19 Ves 144 at 153; and see *White v Bishop of Peterborough* (1818) 3 Swan 109. The court would not interfere with a mortgagee in possession unless he declined to swear that anything was due to him: *Quarrell v Beckford* (1807) 13 Ves 377; *Codrington v Parker* (1810) 16 Ves 469; and see *Rowe v Wood* (1882) 2 Jac & W 553. The rule was thus expressed in *Davis v Duke of Marlborough* (1819) 2 Swan 108 at 137-138 per Lord Eldon LC: 'The court will on motion appoint a receiver for an equitable creditor, or a person having an equitable estate, without prejudice to persons who have prior estates; in this sense, without prejudice to persons having prior legal estates, that it will not prevent their proceeding to obtain possession if they think proper; and with regard to persons having prior equitable estates, the court takes care in appointing a receiver not to disturb prior equities, and for that purpose directs inquiries to determine priorities among equitable incumbrancers; permitting legal creditors to act against the estates at law, and settling the priorities of equitable creditors'. As to the procedure see now CPR Pt 69; and CIVIL PROCEDURE vol 12 (2009) PARA 1502 et seq.

3 See the Supreme Court Act 1981 s 37(1); CIVIL PROCEDURE vol 12 (2009) PARA 1501; and RECEIVERS vol 39(2) (Reissue) PARAS 313, 315. The appointment of a receiver has been said to be one of the oldest equitable remedies: see *Hopkins v Worcester and Birmingham Canal Co*(1888) LR 6 Eq 437 at 447 per Gifford V-C; *A-G v Schonfield*[1980] 3 All ER 1 at 5, [1980] 1 WLR 1182 at 1187 per Megarry V-C.

4 See *Foxwell v Van Grutten*[1897] 1 Ch 64, CA; *John v John*[1898] 2 Ch 573 at 578, CA, per Lindley MR.

5 *Skip v Harwood* (1747) 3 Atk 564.

6 *Angel v Smith* (1804) 9 Ves 335; *Lane v Capsey*[1891] 3 Ch 411 at 414; and see *Brenner v Rose*[1973] 2 All ER 535, [1973] 1 WLR 443. See also *Hart v Emelkirk Ltd, Howroyd v Emelkirk Ltd*[1983] 3 All ER 15, [1983] 1 WLR 1289.

## UPDATE

### 487 Appointment of receivers

NOTE 3--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/G. RECEIVERS/488. Equitable execution.

## **488. Equitable execution.**

The former Court of Chancery enforced its own decrees by sequestration; but, where there was a hindrance to legal execution, it lent its aid to enforce a judgment at law by appointing a receiver<sup>1</sup>. This exercise of the jurisdiction was, however, strictly auxiliary to the legal remedy. The creditor was bound to show by his bill<sup>2</sup> that he had proceeded at law to the extent necessary to give him a complete legal title to execution<sup>3</sup>; consequently he could not obtain a receiver of his debtor's equitable interest in freehold estate without taking out an *elegit*<sup>4</sup>, or, in the case of personalty, a *fieri facias*<sup>5</sup>.

On an application for the appointment of a receiver the court now has power<sup>6</sup> to make an appointment (1) before proceedings have started; (2) in existing proceedings; or (3) on or after judgment<sup>7</sup>. Previously it was generally necessary to show that there was no remedy available at law<sup>8</sup> but a receiver may now be appointed in all cases in which it appears to the court to be just and convenient to do so<sup>9</sup>.

<sup>1</sup> See CIVIL PROCEDURE vol 12 (2009) PARA 1497 et seq. As to the former Court of Chancery see PARAS 401-403 ante.

<sup>2</sup> The bill was the originating process. As to the commencement of proceedings see now CIVIL PROCEDURE vol 11 (2009) PARA 116 et seq.

<sup>3</sup> Mitford, Pleadings in Chancery (5th Edn, 1847) p 149.

<sup>4</sup> No writ of *elegit* could be issued after 31 December 1956 (Administration of Justice Act 1956 s 34 (repealed)); and writs of *elegit* were abolished by the Supreme Court Act 1981 s 141.

<sup>5</sup> *Neate v Duke of Marlborough* (1838) 3 My & Cr 407; *Anglo-Italian Bank v Davies* (1878) 9 ChD 275 at 283, CA per Jessel MR; and see *Angell v Draper* (1686) 1 Vern 399; *Balch v Wastall* (1718) 1 P Wms 445; *Shirley v Watts* (1744) 3 Atk 200.

<sup>6</sup> Under the Supreme Court Act 1981 s 37 or the County Courts Act 1984 s 38 (as substituted), s 107.

<sup>7</sup> CPR 69.2(1); and see CIVIL PROCEDURE vol 12 (2009) PARA 1501.

<sup>8</sup> *Anglo-Italian Bank v Davies* (1878) 9 ChD 275, CA; *Re Watkins, ex p Evans* (1879) 13 ChD 252, CA; *Re Whiteley* (1887) 56 LT 846; *Holmes v Millage* [1893] 1 QB 551, CA; *Harris v Beauchamp Bros* [1894] 1 QB 801, CA; *Hills v Webber* (1901) 17 TLR 513, CA; *Morgan v Hart* [1914] 2 KB 183, CA; *MacLaine Watson & Co Ltd v International Tin Council* [1988] Ch 1, [1987] 3 All ER 787; on appeal [1988] 3 All ER 257, CA; affd [1989] 3 All ER 523, HL. See also *Bourne v Colodense Ltd* [1985] ICR 291, [1985] IRLR 339, CA.

<sup>9</sup> See the Supreme Court Act 1981 s 37(1); and CIVIL PROCEDURE vol 12 (2009) PARA 1501.

## **UPDATE**

### **488 Equitable execution**

NOTES 4, 6, 9--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

NOTE 4--1981 Act s 141 repealed: Statute Law (Repeals) Act 2004.





Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/H. INTERPLEADER/(A) Historical Development of Jurisdiction in Interpleader/489. Legal remedy by interpleader.

## **H. INTERPLEADER**

### **(A) HISTORICAL DEVELOPMENT OF JURISDICTION IN INTERPLEADER**

#### **489. Legal remedy by interpleader.**

The former Court of Chancery exercised a jurisdiction in interpleader<sup>1</sup> supplementary to that at law. At law the remedy by interpleader was confined to cases where property had been delivered on a joint bailment to be held by the bailee until some condition or covenant had been performed by one of the bailors. Whether this performance had taken place was a question in which only the bailors were concerned, but in the event of dispute between them each might bring an action of detinue claiming the property against the bailee. In such a case the bailee might at law require them to settle the dispute themselves, and the process of interpleader applied also in cases of finding, where two parties claimed the thing found against the finder<sup>2</sup>. The process was available in detinue only, and, when detinue fell into disuse and was replaced by trover, interpleader at common law became still further restricted, and in practice recourse was had to the similar relief afforded in equity<sup>3</sup>.

1 As to interpleader see CIVIL PROCEDURE vol 12 (2009) PARA 1587 et seq; and as to the former Court of Chancery see PARAS 401-403 ante.

2 Mitford, Pleadings in Chancery (5th Edn, 1847) pp 164-165; *Crawshay v Thornton* (1837) 2 My & Cr 1 at 21.

3 Story, Equity Jurisprudence s 805. As to interpleader at law see 2 Reeves' History of English Law (Finlason Edn, 1869) p 637 et seq.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/H. INTERPLEADER/(A) Historical Development of Jurisdiction in Interpleader/490. Equitable remedy by interpleader.

#### **490. Equitable remedy by interpleader.**

Subject to certain restrictions as to the nature of the claims made against the person desiring to interplead, the former Court of Chancery extended the remedy of interpleader to all cases to which in conscience it ought to extend, namely where a person not interested was exposed to conflicting claims<sup>1</sup>, whether an action or suit had been begun by any claimant or only a claim made<sup>2</sup>. Thus it applied to cases where two or more persons severally claimed delivery of the same property, payment of the same debt or rendering of the same duty, under different titles or in separate interests, from another person, and the latter did not know to which of the claimants he ought to deliver the property, pay the debt or render the duty<sup>3</sup>. The jurisdiction in equity was supplementary to that at law in the sense that a bill of interpleader would not lie where there was a remedy by interpleader at law<sup>4</sup>, and to some extent equity followed in interpleader the analogy of the remedy at law<sup>5</sup>.

1 See *Langston v Boylston* (1793) 2 Ves 101 at 109. As to the former Court of Chancery see PARAS 401-403 ante.

2 Mitford, Pleadings in Chancery (5th Edn, 1847) p 165; *Jones v Thomas* (1854) 2 Sm & G 186. In *Pearson v Cardon* (1831) 2 Russ & M 606 at 613, Lord Brougham described the jurisdiction in interpleader as strictly a concurrent jurisdiction, but there was no exact line of demarcation between the concurrent and auxiliary jurisdictions and it is needless now to attempt to draw one.

3 Story, Equity Jurisprudence s 806; Mitford, Pleadings in Chancery (5th Edn, 1847) pp 58-59; *Crawshay v Thornton* (1837) 2 My & Cr 1 at 21; *Glyn v Duesbury* (1840) 11 Sim 139; *Sieveking v Behrens* (1837) 2 My & Cr 581; *Hoggart v Cutts* (1841) Cr & Ph 197; *Desborough v Harris* (1855) 5 De GM & G 439. As to conflicting claims to money due under a charterparty see *Rusden v Pope* (1868) LR 3 Exch 269.

4 *Langston v Bolyston* (1793) 2 Ves 101 at 107; *Burnett v Anderson* (1816) 1 Mer 405.

5 *Metcalf v Hervey* (1749) 1 Ves Sen 248. As to the modern practice see CIVIL PROCEDURE vol 12 (2009) PARA 1585 et seq.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/H. INTERPLEADER/(A) Historical Development of Jurisdiction in Interpleader/491. Cases of interpleader in equity.

#### **491. Cases of interpleader in equity.**

To maintain a bill of interpleader it was necessary that the plaintiff should himself claim no interest in the subject matter of the suit<sup>1</sup>. Interpleader did not lie where the person holding the property or owing the debt or duty was under a contract with, or in a relation to, one of the claimants which rendered him personally liable to that claimant apart from the question of property<sup>2</sup>. Thus it did not lie where an agent was exposed to claims by his principal and also by a third party<sup>3</sup>, unless an interest had been created by the principal in favour of the third party<sup>4</sup>; or where a person claimed rent from a tenant adversely to the person whom the tenant had recognised as landlord<sup>5</sup>, unless the claim arose derivatively out of the landlord's title<sup>6</sup>. Interpleader lay in favour of a tenant, however, where conflicting claims were made by persons entitled to annuities or to divided parts of a rentcharge secured on the land<sup>7</sup>. Interpleader lay also where one of the conflicting claims was legal and the other equitable, and where both were equitable<sup>8</sup>. In the last case the proceedings were entirely in equity. Where the claims, or one of them, were legal, they were, as far as practicable, adjudicated upon in equity, but, where necessary, the parties were ordered to interplead at law or an issue at law was directed<sup>9</sup>. The modern practice in interpleader is discussed below<sup>10</sup> and is dealt with in detail elsewhere in this work<sup>11</sup>.

1 *Mitchell v Hayne* (1824) 2 Sim & St 63; *Moore v Usher* (1835) 7 Sim 383.

2 See *Crawshay v Thornton* (1837) 2 My & Cr 1 at 19-24 per Lord Cottenham LC.

3 *Cooper v De Tastet* (1829) Taml 177 at 182; *Pearson v Cardon* (1831) 2 Russ & M 606 at 609; *Crawshay v Thornton* (1837) 2 My & Cr 1 at 22-24.

4 *Smith v Hammond* (1833) 6 Sim 10; *Wright v Ward* (1827) 4 Russ 215. If, after a deposit, the depositor assigned his interest and a dispute as to the assignment arose between him and the assignee, the depository might interplead: *Crawford v Fisher* (1842) 1 Hare 436 at 440.

5 *Metcalf v Hervey* (1749) 1 Ves Sen 248 at 249; *Dungey v Angove* (1794) 2 Ves 304; *Crawshay v Thornton* (1837) 2 My & Cr 1 at 20-22; *Suart v Welch* (1839) 4 My & Cr 305; *Cook v Earl of Rosslyn* (1859) 1 Giff 167.

6 *Hodges v Smith* (1787) 1 Cox Eq Cas 357; *Clarke v Byne* (1807) 13 Ves 383; *Jew v Wood* (1841) Cr & Ph 185.

7 *Aldrich v Thompson* (1787) 2 Bro CC 149; *Angell v Hadden* (1808) 15 Ves 244; subsequent proceedings (1809) 16 Ves 202; (1817) 2 Mer 164; Mitford, Pleadings in Chancery (5th Edn, 1847) p 165; Story, Equity Jurisprudence s 811.

8 Story, Equity Jurisprudence s 808; *Paris v Gilham* (1813) Coop G 56; *Duke of Bolton v Williams* (1793) 2 Ves 138 at 151, 152; *Morgan v Marsack* (1816) 2 Mer 107; *Wright v Ward* (1827) 4 Russ 215; and see *Martinius v Helmuth and Schmidt* (1817) 2 Ves & B 412n.

9 Story, Equity Jurisprudence s 822.

10 See PARA 492 post.

11 See CIVIL PROCEDURE vol 12 (2009) PARA 1585 et seq.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/H. INTERPLEADER/(B) The Modern Practice/492. Interpleader under the Civil Procedure Rules.

## (B) THE MODERN PRACTICE

### **492. Interpleader under the Civil Procedure Rules.**

Under the Civil Procedure Rules (the 'CPR'), interpleader proceedings have different procedures in the High Court and in county courts<sup>1</sup>, although they have the same underlying objective, which is to enable a person who himself makes no claim to property but who faces competing claims from others to remove himself from the dispute and protect himself from the competing claims. Unless made in existing proceedings<sup>2</sup>, the application is made by claim form in the High Court<sup>3</sup> and by filing a notice of claim or a relevant witness statement or affidavit in a county court<sup>4</sup>.

1 As to interpleader in the High Court see CPR Sch 1 RSC Ord 17; and CIVIL PROCEDURE vol 12 (2009) PARA 1587 et seq; and as to interpleader in county courts see CPR Sch 2 CCR Ord 33; and CIVIL PROCEDURE vol 12 (2009) PARA 1628 et seq.

2 As to applications for relief made in existing proceedings see CPR Pt 23; and CIVIL PROCEDURE vol 11 (2009) PARA 304 et seq.

3 See CPR Sch 1 RSC Ord 17 r 3(1); and CIVIL PROCEDURE vol 12 (2009) PARAS 1587, 1609. As to the commencement of proceedings see generally CIVIL PROCEDURE vol 11 (2009) PARA 116 et seq.

4 See CPR Sch 2 CCR Ord 33 rr 1(1); 6(1); and CIVIL PROCEDURE vol 12 (2009) PARAS 1628 et seq.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/l. AVOIDING MULTIPLICITY OF PROCEEDINGS/493. Former bills of peace.

## ***I. AVOIDING MULTIPLICITY OF PROCEEDINGS***

### **493. Former bills of peace.**

The principle that the former Court of Chancery would interfere to prevent multiplicity of suits was the foundation of the jurisdiction to entertain bills of peace. By a bill of peace the plaintiff sought to establish a right which was capable of being, or had actually been, disputed in several actions, and claimed a perpetual injunction against future litigation<sup>1</sup>. It might be resorted to either where one person claimed or defended a right against many, or where many claimed or defended a right against one<sup>2</sup>. It lay, for example, where one person claimed a right of way extending over the land of several landowners, and the bill might be filed before any action had been commenced at law<sup>3</sup>. It was sufficient to make some only of the adverse claimants parties, and an issue was in general directed to settle the question of title at law. If the result was favourable to the plaintiff's title, a decree was made restraining further litigation upon it<sup>4</sup>. Similarly, this remedy was available where some persons sued on behalf of themselves and others in respect of the same right, as where certain of the tenants of a manor sued the lord on behalf of all the tenants to establish a right of common<sup>5</sup>.

1 Story, Equity Jurisprudence s 853. As to the former Court of Chancery see PARAS 401-403 ante.

2 Story, Equity Jurisprudence s 854; Mitford, Pleadings in Chancery (5th Edn, 1847) pp 169-170; *Tenham v Herbert* (1742) 2 Atk 483.

3 *York Corpn v Pilkington* (1737) 1 Atk 282; and see *Sheffield Waterworks v Yeomans* (1866) 2 Ch App 8; *City of London Sewers Comrs v Glasse* (1872) 7 Ch App 456. A plaintiff could come into equity on a legal title before establishing his title at law, in order to prevent multiplicity of suits or irremediable injustice; otherwise he had to establish his title at law before obtaining relief in equity by way of perpetual injunction: *Welby v Duke of Rutland* (1773) 2 Bro Parl Cas 39 at 42, 43. Consequently, where a legal right was in dispute between two only, one of them could not sue in equity to establish his right and be quieted in the possession of it: *Tenham v Herbert* (1742) 2 Atk 483 at 484; *Weller v Smeaton* (1784) 1 Bro CC 572 at 573.

4 Story, Equity Jurisprudence s 854. After a question had been satisfactorily settled at law, equity would grant a perpetual injunction restraining further litigation: *Earl of Bath v Sherwin* (1709) 4 Bro Parl Cas 373, HL (where there had been five trials); *Leighton v Leighton* (1720) 4 Bro Parl Cas 378 (injunction granted after two trials); and see *Devonsher v Newenham* (1804) 2 Sch & Lef 199 at 208. In suitable cases the court, in the exercise of its inherent jurisdiction, would order vexatious litigation to be stopped (*Grepe v Loam, Bulteel v Crepe* (1887) 37 ChD 168, CA; *Lord Kinnaird v Field* [1905] 2 Ch 306, CA), or an action might be dismissed on this ground (*Egbert v Short* [1907] 2 Ch 205). See also *Re Norton's Settlement*, *Norton v Norton* [1908] 1 Ch 471, CA; *Re Page, Hill v Fladgate* [1910] 1 Ch 489, CA. As to the modern jurisdiction to restrain the institution of proceedings see CIVIL PROCEDURE vol 11 (2009) PARA 494 et seq; and as to applications by the Attorney General to restrain vexatious litigation see CIVIL PROCEDURE vol 11 (2009) PARA 258.

5 *Smith v Earl Brownlow* (1870) LR 9 Eq 241. It was sufficient if the plaintiffs sued in respect of a common right, although they might have different rights between themselves: *Warrick v Queen's College, Oxford* (1871) 6 Ch App 716 at 726 per Lord Hatherley LC.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/l. AVOIDING MULTIPLICITY OF PROCEEDINGS/494. Avoiding or restraining multiplicity of proceedings; the modern practice.

#### **494. Avoiding or restraining multiplicity of proceedings; the modern practice.**

Multiplicity of proceedings may now be avoided by the joinder of parties<sup>1</sup> and the use of one claim form to start all claims which can be conveniently disposed of in the same proceedings<sup>2</sup>.

The restriction of vexatious civil proceedings is dealt with elsewhere in this work<sup>3</sup>.

<sup>1</sup> See CPR Pt 19; and CIVIL PROCEDURE vol 11 (2009) PARA 210 et seq. As to group litigation see CIVIL PROCEDURE vol 11 (2009) PARA 233 et seq.

<sup>2</sup> See CPR 7.3; and CIVIL PROCEDURE vol 11 (2009) PARAS 18, 119.

<sup>3</sup> See CIVIL PROCEDURE vol 11 (2009) PARA 258.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(1) NATURE AND EXTENT OF EQUITABLE JURISDICTION/(v) The Auxiliary Jurisdiction in Equity/J. NE EXEAT REGNO/495. Writ ne exeat regno.

## ***J. NE EXEAT REGNO***

### **495. Writ ne exeat regno.**

The writ ne exeat regno, which was issued in certain cases to prevent a defendant from leaving the country during the pendency of the suit, was chiefly incidental to the exclusive jurisdiction of equity, and is still available<sup>1</sup>.

Formerly, where a claim was made at law, the plaintiff could arrest the defendant on mesne process and require him to give bail for his appearance<sup>2</sup>. The writ ne exeat regno was used for a corresponding purpose in equitable demands<sup>3</sup>. It was issued only after a bill had been filed, and was not available in cases of legal demand<sup>4</sup> except where equity had concurrent jurisdiction, as in account<sup>5</sup>. It thus constituted a species of equitable bail<sup>6</sup>. The writ was also available for the purpose of enforcing alimony ordered to be paid by the ecclesiastical court, since that court could not compel the husband to find bail<sup>7</sup>; but it was available only for arrears and costs<sup>8</sup>.

The principles governing the former practice still prevail. For the writ to be issued, it is essential that the claim should be a debt or pecuniary demand, certain in its nature and not contingent, and presently due<sup>9</sup>, although, where by a peremptory order time for payment of money already due has been fixed by the court, this last requirement does not prevent the issue of the writ before that time<sup>10</sup>. Hence the writ is not available where the claim is unliquidated or in the nature of damages<sup>11</sup>. It must be clearly established that the amount claimed is due<sup>12</sup>, and the evidence that the defendant is about to leave the country must be direct and unequivocal<sup>13</sup>. It is not necessary to show that he is going abroad to avoid the demand; it is sufficient if the debt is in danger<sup>14</sup>. Jurisdiction to issue the writ is not limited to cases where the claimant wishes to call the defendant as his witness<sup>15</sup>. The writ may be issued in support of a freezing injunction in order to prevent a defendant from leaving the jurisdiction with assets in order to frustrate a lawful claim before the court<sup>16</sup>; but it may not be issued for the primary purpose of enforcing a freezing injunction<sup>17</sup>. The writ is a means of assisting a claimant in obtaining judgment, not in executing it; but obtaining judgment entails the claimant's obtaining an order in a form which could properly be executed. Unless and until that happens, the claimant is still prosecuting his claim rather than proceeding to execution of it<sup>18</sup>.

The writ is an ancient remedy which should not be extended; thus it is an order which the court may only make if it is satisfied that such remedy is proportionate and necessary to secure the ends of justice<sup>19</sup>.

<sup>1</sup> The abolition of the writ ne exeat regno was recommended by the Payne Committee in the Report on the Enforcement of Judgment Debts (Cmnd 3909) PARAS 1245-1260.

<sup>2</sup> Arrest on mesne process at law has been abolished, and a corresponding but more restricted process is given by the Debtors Act 1869 s 6 (as amended). Unless the requirements of s 6 (as amended) are met, the writ will not be granted: *Drover v Beyer* (1879) 13 ChD 242 at 243, CA, per Jessel MR; *Hands v Hands* (1881) 43 LT 750; *Felton v Callis* [1969] 1 QB 200, [1968] 3 All ER 673; but see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 116.

<sup>3</sup> The writ was a prerogative writ, and was originally used for political purposes. In the sixteenth century it came to be used in equity in aid of civil process (Story, Equity Jurisprudence s 1467), but it was applied in cases



of private right with great caution and jealousy (*Tomlinson v Harrison* (1802) 8 Ves 32; and see *Whitehouse v Partridge* (1818) 3 Swan 365 at 379). As to the writ generally see 1 Holdsworth's History of English Law (7th Edn) 230.

4 *Ex p Brunker* (1734) 3 P Wms 312; and see *Jackson v Petrie* (1804) 10 Ves 164.

5 *Jones v Alephsin* (1810) 16 Ves 470; *Flack v Holm* (1820) 1 Jac & W 405 at 414; *Lees v Patterson* (1878) 7 ChD 866. Since there was concurrent jurisdiction in matters of account, the writ was allowed in a case where the defendant admitted a balance to be due from him, even though the plaintiff (now generally known as the 'claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18) alleged that the amount due was greater: *Jones v Sampson* (1803) 8 Ves 593.

6 *Etches v Lance* (1802) 7 Ves 417; and see *Ex p Brunker* (1734) 3 P Wms 312. The writ was not issued after bail given at law: *Amsinck v Barklay* (1803) 8 Ves 594.

7 *Colverson v Bloomfield* (1885) 29 ChD 341, CA. In *White v Milburn* (23 May 1957, unreported), a writ was applied for ex parte in a partnership action, but the account submitted did not have sufficient detail for the amount due to be ascertained: see 107 L Jo 401.

8 *Sobey v Sobey* (1873) LR 15 Eq 200. If the defendant does not move to discharge the writ, it will be deemed to have been properly issued, and he cannot recover damages for any irregularity: *Lees v Patterson* (1878) 7 ChD 866.

9 *Cock v Ravie* (1801) 6 Ves 283; *Blaydes v Calvert* (1820) 2 Jac & W 211.

10 *Jenkins v Parkinson* (1833) 2 My & K 5 at 13. However, with respect to the balance of an account, it was enough to swear to belief that a certain sum was due: *Hyde v Whitfield* (1815) 19 Ves 342; *Jenkins v Parkinson* supra.

11 *Etches v Lance* (1802) 7 Ves 417; *Hyde v Whitfield* (1815) 19 Ves 342; *Jones v Alephsin* (1810) 16 Ves 470; *Re Underwood, Re Bowles, U v W* (1903) 51 WR 335, CA (the circumstances must be such as would have justified the issue of a writ of attachment).

12 *Tomlinson v Harrison* (1802) 8 Ves 32.

13 *Felton v Callis* [1969] 1 QB 200 at 213, [1968] 3 All ER 673 at 681, where at 216 and at 683 Megarry J doubted whether the writ was available in *quia timet* proceedings (see PARA 484 ante) to enforce a legal obligation.

14 *Vandergucht v De Blaquiere* (1838) 8 Sim 315 at 322.

15 *Dawson v Dawson* (1803) 7 Ves 173.

16 *Al Nahkel for Contracting and Trading Ltd v Lowe* [1986] QB 235, [1986] 1 All ER 729. In *Allied Arab Bank Ltd v Hajjar* [1988] QB 787 at 793, [1987] 3 All ER 739 at 744, however, Leggatt J disagreed with this proposition unless restricted to those cases where both remedies may properly issue, with the result that the arrest of the debtor may incidentally prevent him from breaching the freezing injunction. For an example of the issue of a writ ne exeat regno see *Thaha v Thaha* [1987] 2 FLR 142, [1987] Fam Law 234; and see *Clark v Clark* [1989] FCR 101, [1989] 1 FLR 174. See also MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 663. As to freezing injunctions generally see CIVIL PROCEDURE vol 11 (2009) PARA 396 et seq; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 998 et seq.

17 *Allied Arab Bank Ltd v Hajjar* [1988] QB 787, [1987] 3 All ER 739. One of the requirements of the issue of a writ ne exeat regno is that the absence of the defendant from England would materially prejudice the claimant in the prosecution of his claim; since a freezing injunction is a remedy in aid of execution and may not by itself be a part of the prosecution of a claim, a claimant cannot satisfy the requirement merely by showing that the enforcement of a freezing injunction would be prejudiced by the defendant's absence from the jurisdiction: *Allied Arab Bank Ltd v Hajjar* supra; *B v B (injunction: restraint on leaving jurisdiction)* [1997] 3 All ER 258.

18 *Lipkin Gorman (a firm) v Cass* (1985) Times, 29 May.

19 *Ali v Naseem* (2003) Times, 3 October.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(2) EXERCISE OF EQUITABLE JURISDICTION/496. Union of the courts of law and equity.

## (2) EXERCISE OF EQUITABLE JURISDICTION

### 496. Union of the courts of law and equity.

The Supreme Court of Judicature Act 1873<sup>1</sup> ended the twofold system of jurisdiction at law and in equity in the superior courts<sup>2</sup>. The general scope of that Act was to enable a suitor to obtain by one proceeding in one court the same ultimate result as he would previously have obtained either by having selected the right court, as to which there was frequently a difficulty, or after (as was sometimes necessary) having been to two courts in succession<sup>3</sup>. This was effected by uniting the former Court of Chancery, the superior courts of common law and the other superior courts into one Supreme Court of Judicature (now the Supreme Court of England and Wales)<sup>4</sup>, which was divided into the High Court and the Court of Appeal<sup>5</sup>, and transferring to the High Court the jurisdictions of these various courts, including the jurisdiction of the former Court of Chancery as a common law court as well as a court of equity<sup>6</sup>. Certain matters were specially assigned to the Chancery Division of the High Court<sup>7</sup>.

To the Chancery Division there are now assigned all causes and matters relating to:

- 49 (1) the sale, exchange or partition of land, or the raising of charges on land;
- 50 (2) the redemption or foreclosure of mortgages;
- 51 (3) the execution of trusts;
- 52 (4) the administration of the estates of deceased persons;
- 53 (5) bankruptcy;
- 54 (6) the dissolution of partnerships or the taking of partnership or other accounts;
- 55 (7) the rectification, setting aside or cancellation of deeds or other instruments in writing;
- 56 (8) probate business, other than non-contentious or common form business;
- 57 (9) patents, trade marks<sup>8</sup>, registered designs or copyright or design right<sup>9</sup>;
- 58 (10) the appointment of a guardian of a minor's estate,

and all causes and matters involving the exercise of the High Court's jurisdiction under the enactments relating to companies<sup>10</sup>.

The assignment of statutory appeals and other miscellaneous appeals and applications to the Chancery Division under the Civil Procedure Rules is discussed elsewhere in this work<sup>11</sup>.

1 See the Supreme Court of Judicature Act 1873 s 24 (repealed): see now the Supreme Court Act 1981 s 49; and CIVIL PROCEDURE vol 11 (2009) PARA 533; COURTS.

2 See *Warner v Murdoch, Murdoch v Warner*(1877) 4 ChD 750 at 752, CA.

3 *Torkington v Magee*[1902] 2 KB 427 at 430 per Channell J.

4 See the Supreme Court of Judicature Act 1873 s 3 (replaced by the Supreme Court of Judicature (Consolidation) Act 1925 s 1, itself replaced by the Supreme Court Act 1981 s 1). As to the former Court of Chancery see PARAS 401-403 ante.

5 See the Supreme Court of Judicature Act 1873 ss 4-6 (repealed); and the Supreme Court Act 1981 s 1. The court is now not a court of law or a court of equity; it is a court of complete jurisdiction: *Pugh v Heath*(1882) 7

App Cas 235 at 237, HL, per Earl Cairns; and see *Salt v Cooper*(1880) 16 ChD 544 at 553, CA; *Antrim County Land, Building and Investment Co Ltd and Houston v Stewart*[1904] 2 IR 357 at 364, CA, per Palles CB.

6 See the Supreme Court of Judicature Act 1873 s 16(1) (repealed); and the Supreme Court Act 1981 s 19.

7 The effect of the Judicature Acts is frequently referred to as 'the fusion of law and equity', but exception has been taken to the use of this phrase. 'It was not any fusion, or anything of the kind; it was the vesting in one tribunal the administration of law and equity in every cause, action or dispute which should come before that tribunal': *Salt v Cooper*(1880) 16 ChD 544 at 549, CA, per Jessel MR. See also PARA 401 ante.

As to the Chancery Division of the High Court see COURTS vol 10 (Reissue) PARA 611; as to parties in claims for an injunction see CIVIL PROCEDURE vol 11 (2009) PARA 408 et seq; as to proceedings for specific performance see SPECIFIC PERFORMANCE; and as to drawing up judgments see CIVIL PROCEDURE vol 12 (2009) PARA 1139.

8 See the Trade Marks Act 1994; and TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 2 et seq.

9 As to design right see also the Design Right (Semiconductor Topographies) Regulations 1989, SI 1989/1100 (as amended); and COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 590 et seq.

10 See the Supreme Court Act 1981 s 61(1), Sch 1 para 1 (amended by the Copyright, Designs and Patents Act 1988 s 303(1), Sch 7 para 28(1), (3); and see also the Trade Marks Act 1994 s 106(1), Sch 4 para 1(1)); and COURTS vol 10 (Reissue) PARA 611. As to the Patents Court see COURTS vol 10 (Reissue) PARA 612.

11 See CIVIL PROCEDURE vol 12 (2009) PARAS 1686, 1694-1695.

## **UPDATE**

### **496 Union of the courts of law and equity**

NOTES--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(2) EXERCISE OF EQUITABLE JURISDICTION/497. Equitable jurisdiction of county courts.

#### **497. Equitable jurisdiction of county courts.**

Apart from the Supreme Court and the House of Lords, equitable jurisdiction is exercised only in the county courts<sup>1</sup>. A statutory jurisdiction in equity has been conferred on county courts, that jurisdiction being limited by reference to the amount or value of the subject matter of the proceedings<sup>2</sup>. Without prejudice to such general jurisdiction, the county court also has an equitable jurisdiction under certain enactments<sup>3</sup>. If, as respects any proceedings in equity, otherwise than in regard to the variation of trusts<sup>4</sup>, in which the county court would have jurisdiction but for the amount or value of the subject matter, the parties agree, by a memorandum signed by them or their respective legal representatives or agents, that a county court specified in the memorandum should have jurisdiction in the proceedings, that court, notwithstanding anything in any enactment, has jurisdiction to hear and determine the proceedings accordingly<sup>5</sup>.

1 As to county courts see generally COURTS vol 10 (Reissue) PARA 701 et seq. As equity has no jurisdiction in criminal matters as such (see PARA 409 ante), equity jurisdiction is not exercisable in the Crown Court nor is it exercisable in magistrates' courts.

2 See the County Courts Act 1984 s 23; and COURTS vol 10 (Reissue) PARA 719. As to the ancillary and interim jurisdiction of county courts see s 38 (as substituted); and COURTS vol 10 (Reissue) PARA 711.

3 See *ibid* s 148(1), Sch 2 (as amended); and COURTS.

4 *Ie* under the Variation of Trusts Act 1958 s 1 (as amended): see TRUSTS vol 48 (2007 Reissue) PARA 1062 et seq.

5 See the County Courts Act 1984 s 24 (as amended); and COURTS vol 10 (Reissue) PARA 719.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(2) EXERCISE OF EQUITABLE JURISDICTION/498. Legal and equitable remedies granted in the same proceedings.

#### **498. Legal and equitable remedies granted in the same proceedings.**

The fundamental idea of the Supreme Court of Judicature Act 1873 was to avoid multiplicity of proceedings<sup>1</sup>. This was expressed in the provision that the High Court and Court of Appeal, in every cause or matter pending before them, should grant all such remedies as any of the parties might appear to be entitled to in respect of every legal or equitable claim properly brought forward by them in the cause or matter<sup>2</sup>, so that, as far as possible, all the matters so in controversy between the parties might be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided<sup>3</sup>.

1 *McGowan v Middleton* (1883) 11 QBD 464 at 468, CA, per Brett MR.

2 Supreme Court of Judicature Act 1873 s 24(7) (repealed); re-enacted in the Supreme Court of Judicature (Consolidation) Act 1925 s 43 (repealed). See now the Supreme Court Act 1981 s 49; and PARA 499 post. See also *O'Keefe v Walsh* [1903] 2 IR 681 at 709, CA, per Lord O'Brien. This provision did not, however, extend the remedies previously available; it only enabled the High Court and every branch of it to give effect to all the remedies which could have been given before the 1873 Act by any court which was made part of the High Court: *The James Westoll* [1905] P 47 at 51, CA; and see *The Recepta* [1893] P 255, CA.

3 The provisions of the Supreme Court Act 1981 s 49 (see PARAS 499-500 post) are expressed in wide terms, and it is apprehended that s 49 reproduces the effect of the Supreme Court of Judicature (Consolidation) Act 1925 s 43 (repealed) in somewhat different language. Section 43 (repealed) referred to 'every cause or matter pending before the court'; and it was held that the cause was pending so long as the final judgment remained unsatisfied, and hence a receiver might be appointed by way of equitable execution upon application in the action, even where there was originally no claim for a receiver: *Salt v Cooper* (1880) 16 ChD 544 at 550, CA (decided on the Supreme Court of Judicature Act 1873 s 24(7) (repealed)). This principle was not, however, applied to a charging order on shares obtained by a judgment creditor, and to enforce the order new proceedings must be brought: *Leggott v Western* (1884) 12 QBD 287; *Kolchmann v Meurice* [1903] 1 KB 534, CA. The Admiralty Court, which is part of the Queen's Bench Division (see the Supreme Court Act 1981 s 61, Sch 1 para 2(c); and COURTS vol 10 (Reissue) PARA 615; SHIPPING AND MARITIME LAW vol 93 (2008) PARA 85 et seq), may grant specific performance in an admiralty action in rem: *The Conoco Britannia* [1972] 2 QB 543, [1972] 2 All ER 238.

#### **UPDATE**

#### **498 Legal and equitable remedies granted in the same proceedings**

NOTES 2, 3--Supreme Court Act 1981 now cited as Senior Courts Act 1981:  
Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(2) EXERCISE OF EQUITABLE JURISDICTION/499. Claims upon which the court may adjudicate.

#### **499. Claims upon which the court may adjudicate.**

Every court exercising jurisdiction in England or Wales in any civil cause or matter must give the same effect as hitherto<sup>1</sup>:

- 59 (1) to all equitable estates, titles, rights<sup>2</sup>, reliefs, defences<sup>3</sup> and counterclaims<sup>4</sup>, and to all equitable duties and liabilities<sup>5</sup>; and
- 60 (2) subject thereto, to all legal claims and demands and all estates, titles, rights, duties, obligations and liabilities existing by the common law or by any custom or created by any statute,

and, subject to any provision of the Supreme Court Act 1981 or any other Act, must so exercise its jurisdiction in every cause or matter before it as to secure that, as far as possible, all matters in dispute between the parties are completely and finally determined, and all multiplicity of legal proceedings with respect to any of those matters is avoided<sup>6</sup>.

1 The same effect as given prior to 1 January 1982 (the date on which the Supreme Court Act 1981 s 49 came into force).

2 An equitable claim is, however, still subject to the rule that a claimant who comes for equity must do equity, and he may be put upon terms (*Lodge v National Union Investment Co Ltd* [1907] 1 Ch 300), although he may obtain a declaration of his mere legal right without terms (*Chapman v Michaelson* [1909] 1 Ch 238, CA: see PARA 559 note 8 post).

3 In a foreclosure claim the mortgagor may raise questions as to the mortgagee's charges which would formerly have required the filing of a cross bill (*Eyre v Hughes* (1876) 2 ChD 148); in a claim for a debt by a trustee, the defendant may set up a claim of his own against the beneficiary (*Banks v Jarvis* [1903] 1 KB 549); a legal right to possession of land cannot be enforced if the defendant has an equitable right to prevent its enforcement (*Warren v Murray* [1894] 2 QB 648 at 652 per Lord Esher MR, applied in *Smith v Lawson* (1997) 75 P & CR 466, CA); where there is an equitable claim by the defendant to have a deed set aside, the Queen's Bench Division can treat it as set aside for the purpose of the proceedings, although a claim in the Chancery Division must be brought to set it aside in the future (*Mostyn v West Mostyn Coal and Iron Co* (1876) 1 CPD 145 at 150); and the court, if there is evidence on which it can rectify an instrument on the ground of mistake, can treat it as rectified (*Breslaue v Barwick* (1876) 24 WR 901), and order performance of an agreement thus rectified (*Olley v Fisher* (1886) 34 ChD 367; *Borrowes v Delaney* (1889) 24 LR Ir 503; *Shrewsbury and Talbot Cab and Noiseless Tyre Co Ltd v Shaw* (1890) 89 LT Jo 274). That the court can in the same proceedings rectify an agreement and order it to be performed as rectified was doubted by Neville J in *Thompson v Hickman* [1907] 1 Ch 550 at 561, but this view has been affirmed in *Craddock Bros v Hunt* [1923] 2 Ch 136, CA, and subsequently in the Privy Council (*United States of America v Motor Trucks Ltd* [1924] AC 196, PC), notwithstanding that the result is to enforce an agreement of which there is no written memorandum. A party seeking equity must do equity: see PARA 558 post.

4 The mere fact that a defendant counterclaims in a claim in the Queen's Bench Division for rectification of a deed or specific performance is not in itself a ground for transferring the proceedings to the Chancery Division: *Storey v Waddle* (1879) 4 QBD 289, CA. As to counterclaims see *McGowan v Middleton* (1883) 11 QBD 464, CA; and for the procedure see now CPR Pt 20; and CIVIL PROCEDURE vol 11 (2009) PARA 618 et seq.

5 A legal right, such as that of an execution creditor, is subject to all equities affecting the property (*Simultaneous Colour Printing Syndicate v Foweraker* [1901] 1 KB 771; cf *Re Standard Manufacturing Co* [1891] 1 Ch 627 at 641, CA); where money is borrowed without authority, the equitable right of subrogation is recognised (*Bannatyne v MacIver* [1906] 1 KB 103, CA); where an instrument has been obtained by undue influence, the equity arising from it renders it unenforceable (*Chaplin & Co Ltd v Brammall* [1908] 1 KB 233, CA); and effect is given to equities in interpleader proceedings (*Usher v Martin* (1889) 24 QBD 272; *Jennings v Mather* [1901] 1 KB 108 at 115-116, DC; affd [1902] 1 KB 1, CA).

6 Supreme Court Act 1981 s 49(2). The rules of equity, however, prevail: see PARA 500 post.

## **UPDATE**

### **499 Claims upon which the court may adjudicate**

TEXT AND NOTES 1, 6--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force on 1 October 2009: SI 2009/1604).

NOTE 4--CPR Pt 20 substituted: SI 2005/3515.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(2) EXERCISE OF EQUITABLE JURISDICTION/500. Rules of equity to prevail.

## **500. Rules of equity to prevail.**

Subject to the provisions of the Supreme Court Act 1981 or any other Act, every court exercising jurisdiction in England or Wales in any civil cause must continue to administer law and equity on the basis that, wherever there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity are to prevail<sup>1</sup>.

<sup>1</sup> Supreme Court Act 1981 s 49(1). The principle contained in s 49(1) relates to matters of substantive law and not of practice (*La Grange v McAndrew* (1879) 4 QBD 210); it does not mean that the procedure of the former Court of Chancery is to be followed in ordinary common law proceedings (*Harrison v Duke of Rutland* [1893] 1 QB 142 at 149, CA). Despite the provisions of the Supreme Court Act 1981 s 49(1) there still subsists a distinction between legal and equitable principles and between legal and equitable interests: see PARA 501 post. As to the former Court of Chancery see PARAS 401-403 ante.

### **UPDATE**

#### **500 Rules of equity to prevail**

TEXT AND NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force on 1 October 2009: SI 2009/1604).



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(2) EXERCISE OF EQUITABLE JURISDICTION/501. Distinction between legal and equitable rights.

### 501. Distinction between legal and equitable rights.

It was not provided by the Supreme Court of Judicature Act 1873 that legal and equitable rights should be treated as identical<sup>1</sup>, and the same distinction existed between legal and equitable estates and interests as before the Act, and, subject to the rearrangement of legal and equitable estates and interests made by the Law of Property Act 1925<sup>2</sup>, it still exists<sup>3</sup>. Where the court is dealing with questions of legal right, the principles established at law prevail<sup>4</sup>.

Moreover, relief on equitable grounds is in general obtainable only in cases where it would have been granted by a court of equity before the Supreme Court of Judicature Act 1873<sup>5</sup>. In matters of procedure, however, a person equitably entitled may have an advantage by reason of the fusion of jurisdiction. Thus the plea of purchase for value without notice is not now a bar to disclosure in aid of the legal title<sup>6</sup>.

1 *Joseph v Lyons* (1884) 15 QBD 280 at 286, CA.

2 See PARA 601 post.

3 Thus an assignment of after-acquired chattels still gives an equitable interest only (*Joseph v Lyons* (1884) 15 QBD 280, CA; *Hallas v Robinson* (1885) 15 QBD 288, CA); and an equitable assignment of leaseholds does not operate as a legal assignment (*Gentle v Faulkner* [1900] 2 QB 267 at 275, 277, CA). Until the Law of Property Act 1925 (see PARA 605 post) the owner of an equity of redemption had, apart from statute, equitable rights only, and could not enforce his rights against a tenant as though he were legal owner: *Matthews v Usher* [1900] 2 QB 535, CA. Where, however, a person entitled in equity to an interest in land under an agreement is also entitled to specific performance and to have his interest turned into a legal interest, he will, in a court having jurisdiction to order specific performance, be treated as having the rights of a legal owner: *Walsh v Lonsdale* (1882) 21 ChD 9, CA; and see *Manchester Brewery Co v Coombs* [1901] 2 Ch 608 at 617. In proceedings to enforce a legal right of property the legal owner must be before the court (*Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1, HL) and an equitable owner cannot purely as such sue in conversion (*MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675, [1998] 2 BCLC 659, CA). As to the tort of conversion see TORT vol 45(2) (Reissue) PARA 548 et seq.

4 *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 188, HL.

5 The true construction of the Judicature Acts is that they conferred no new rights; they only confirmed the rights which previously were to be found existing in the courts either of law or of equity. If they did more, they would alter the rights of parties, whereas in truth they only change the procedure: *Britain v Rossiter* (1879) 11 QBD 123 at 129, CA, per Brett LJ; and see at 133 per Cotton LJ. See also *Stumore v Campbell & Co* [1892] 1 QB 314 at 316, CA, per Esher MR.

6 *Ind, Coope & Co v Emmerson* (1887) 12 App Cas 300, HL; and see PARA 565 et seq post.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/1. EQUITABLE JURISDICTION/(2) EXERCISE OF EQUITABLE JURISDICTION/502-550. The equitable maxims.

### **502-550. The equitable maxims.**

In the exercise of the equitable jurisdiction judges not infrequently refer to one or other of the so-called maxims of equity; but these maxims are not so much rules to be applied as indications of the background principles behind the detailed rules that equity has built up. As such they may act as rather general guidelines to a court in reaching a decision<sup>1</sup>. Some of the maxims are too general to be of much help in practice. Thus the maxim 'Equity will not suffer a wrong to be without a remedy' can be regarded as the basis of the whole of the equity jurisdiction. It is of little assistance, however, in deciding a particular case<sup>2</sup>. It has been said that the maxim 'must be taken as referring to rights which are suitable for judicial enforcement, but which were not enforced at common law owing to some technical defect'<sup>3</sup>. But, even if so suitable, equity may refuse to intervene, for instance on grounds of public policy.

1 The earliest collection of maxims is probably Francis, *Maxims of Equity* (1727). The equitable maxims are sometimes restricted to 12 in number (see eg Snell's *Principles of Equity* (30th Edn, 2000) p 27) but there is no authority for so restricting them. As to the principles of equitable jurisdiction see PARA 551 et seq post. Note *P v P (financial relief: non-disclosure)* [1994] 1 FCR 293, [1994] 2 FLR 381, where Thorpe J observed, at 306 and at 393, that in assessing ancillary relief after divorce 'the court has a duty to discharge a statutory function on the application of statutory criteria, and maxims of equity have nothing to do with it', dismissing the suggestion of Lincoln J in *B v B (real property: assessment of interests)* [1988] 2 FLR 490.

2 The maxim is cited by Lord Goff of Chieveley in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 695-696, [1996] 2 All ER 961 at 979, HL.

3 See Snell's *Principles of Equity* (30th Edn, 2000) p 28.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(1) EQUITY ACTS IN PERSONAM/551. Equity acts in personam.

## 2. PRINCIPLES OF EQUITABLE JURISDICTION

### (1) EQUITY ACTS IN PERSONAM

#### 551. Equity acts in personam.

A court of equity operates primarily in personam and not in rem<sup>1</sup>; and in the exercise of its jurisdiction in personam it will compel the performance of contracts and trusts relating to property which is not situated within the jurisdiction<sup>2</sup>. Claims for foreclosure of mortgages<sup>3</sup>, for accounts between mortgagor and mortgagee<sup>4</sup> or for the appointment of a receiver<sup>5</sup> are entertained in England and Wales even where the mortgaged property is out of the jurisdiction. The same is the case with regard to claims relating to property abroad in which relief is sought on the ground of fraud, since fraud is upon the conscience of the party<sup>6</sup>; or where relief is sought on the ground that a judgment obtained abroad is being made the instrument of gross injustice<sup>7</sup>. The jurisdiction to grant freezing injunctions<sup>8</sup> may extend over assets worldwide because it depends on the unlimited jurisdiction of the court in personam against any person who under English procedure is properly made a party to proceedings pending in England and Wales<sup>9</sup>.

1 See *Swiss Bank Corp'n v Lloyds Bank Ltd*[1979] Ch 548 at 565, [1979] 2 All ER 853 at 865-866 per Browne-Wilkinson J; *Chellaram v Chellaram*[1985] Ch 409 at 428, [1985] 1 All ER 1043 at 1053 per Scott J. However, the former Court of Chancery found it necessary to enforce its decrees by process against the defendant's property which it did by sequestration (Ashburner, *Principles of Equity* (2nd Edn, 1933) p 44); and see CIVIL PROCEDURE vol 12 (2009) PARA 1380 et seq. The observations of Roskill LJ and Sir John Pennycuik in *Warner Bros Records Inc v Rollgreen Ltd*[1976] QB 430, [1975] 2 All ER 105, CA, have been said to place undue emphasis on this maxim: *Three Rivers District Council v Bank of England (Governor and Co)*[1996] QB 292 at 302, [1995] 4 All ER 312 at 321, CA, per Staughton LJ. As to the former Court of Chancery see PARAS 401-403 ante.

2 *Archer v Preston* (earlier than 1682) cited in *Arglasse v Muschamp* (1682) 1 Vern 76 at 77; *Penn v Lord Baltimore* (1750) 1 Ves Sen 444; 1 White & Tud LC (9th Edn) 638 (specific performance of an agreement relating to the boundaries between Pennsylvania and Maryland); *Lord Kildare v Eustace* (1686) 2 Cas in Ch 188; *Ewing v Orr Ewing*(1883) 9 App Cas 34 at 40, HL, per Lord Selborne LC; *Re Clinton, Clinton v Clinton* (1903) 51 WR 316 (execution of trusts of property situated abroad); *Richard West & Partners (Inverness) Ltd v Dick*[1969] 2 Ch 424 at 433, [1969] 1 All ER 943, CA (specific performance of contract for the sale of land in Scotland); *Webb v Webb*[1992] 1 All ER 17, [1991] 1 WLR 1410 (on appeal (1992 Financial Times, 11 March, CA; further proceedings Case C-294/92[1994] QB 696, [1994] 3 All ER 911, EC)). As to equitable jurisdiction in personam in relation to conflict of laws see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 396 et seq.

3 *Toller v Carteret* (1705) 2 Vern 494 (foreclosure of mortgage of island of Sark); *Paget v Ede*(1874) LR 18 Eq 118 (land in the West Indies); *Earl of Athol v Earl of Derby* (1672) 1 Cas in Ch 220 (portions charged on Isle of Man); *Re Courtney, ex p Pollard* (1840) Mont & Ch 239 (enforcement of equitable mortgage of land in Scotland); and see MORTGAGE vol 77 (2010) PARA 566 et seq.

4 *Scott v Nesbitt* (1808) 14 Ves 438; and see MORTGAGE vol 77 (2010) PARA 705 et seq.

5 *Mercantile Investment and General Trust Co v River Plate Trust, Loan and Agency Co*[1892] 2 Ch 303; and see MORTGAGE vol 77 (2010) PARA 560 et seq.

6 *Angus v Angus* (1737) West temp Hard 23; *British South Africa Co v Cia de Moçambique*[1893] AC 602 at 626, HL, per Lord Herschell LC; and see *Arglasse v Muschamp* (1682) 1 Vern 76.

7 *Lord Cranstown v Johnston* (1796) 3 Ves 170 at 183; and see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 396 et seq.

8 As to freezing injunctions (formerly known as 'Mareva' injunctions following *Mareva Cia Navera SA v International Bulkcarriers SA, The Mareva*[1980] 1 All ER 213n, CA) generally see CIVIL PROCEDURE vol 11 (2009) PARA 396 et seq; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 998 et seq.

9 *Babanaft International Co SA v Bassatne*[1990] Ch 13, [1989] 1 All ER 433, CA; *Republic of Haiti v Duvalier*[1990] 1 QB 202, [1989] 1 All ER 456, CA; *Derby & Co Ltd v Weldon*[1990] Ch 48, [1989] 1 All ER 469, CA; *Derby & Co Ltd v Weldon (No 2)*[1989] 1 All ER 1002; sub nom *Derby & Co Ltd v Weldon (Nos 3 & 4)* [1989] 2 WLR 412; *Derby & Co Ltd v Weldon (No 6)*[1990] 3 All ER 263, [1990] 1 WLR 1139, CA.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(1) EQUITY ACTS IN PERSONAM/552. Limits of the jurisdiction.

## 552. Limits of the jurisdiction.

The court will intervene only where the defendant is resident within the jurisdiction<sup>1</sup>, and where its order can be executed by the process of the court. Consequently there cannot be a judgment for delivery of possession of land situated abroad<sup>2</sup>, or for recovery of a rentcharge, for which the proper remedy is a local action<sup>3</sup>; nor would a court of equity under the former practice direct an issue at law to try the validity of a will of land abroad<sup>4</sup>; nor will it determine a claim depending on the title to land in a foreign country strictly so called, that is, being no part of the British dominions or possessions, simply because the parties happen to be within the jurisdiction<sup>5</sup>; unless, having jurisdiction as to personalty, it extends its jurisdiction to the realty because the two are so mixed together that it is impossible to separate them<sup>6</sup>, or unless there is a contract between the parties to the action, or the defendant is liable to a trust or other equitable obligation<sup>7</sup>. The court will not interfere where there is already litigation in the appropriate foreign court<sup>8</sup>; nor will it make an order which involves a breach of the foreign law properly governing the property or its disposition<sup>9</sup>.

Where the relief prayed falls within the above principles, the jurisdiction is exercisable not only in respect of property in the dominions of the Crown, but also in respect of property situated in foreign countries<sup>10</sup>.

1 *Matthaei v Galitzin* (1874) LR 18 Eq 340; and see *Cookney v Anderson* (1863) 1 De GJ & Sm 365.

2 *Roberdeau v Rous* (1738) 1 Atk 543. Partly on account of the difficulty of dealing with the possession, a claim does not lie in England and Wales for trespass to land abroad.

3 *Whitaker v Forbes* (1875) 1 CPD 51, CA.

4 *Pike v Hoare* (1763) 2 Eden 182.

5 *Re Hawthorne, Graham v Massey* (1883) 23 ChD 743.

6 *Re Clinton, Clinton v Clinton* (1903) 51 WR 316.

7 *Norris v Chambres* (1861) 3 De GF & J 583; *Deschamps v Miller* [1908] 1 Ch 856; Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 945 et seq; and see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 396.

8 *Norton v Florence Land and Public Works Co* (1877) 7 ChD 332.

9 *Waterhouse v Stansfield* (1851) 9 Hare 234; and see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 397.

10 *Angus v Angus* (1737) West temp Hard 23. Some of the cases confined the jurisdiction to dominions of the Crown by the principle that the different courts of equity derive their jurisdiction from the same source: *Foster v Vassall* (1747) 3 Atk 587.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(2) EQUITY GIVES ACCOUNT OF PROFITS NOT DAMAGES/553. Principle of relief in equity.

## **(2) EQUITY GIVES ACCOUNT OF PROFITS NOT DAMAGES**

### **553. Principle of relief in equity.**

The principle underlying relief at law is that the claimant has suffered loss by the defendant's breach of contract or wrongful conduct, and damages are awarded for the purpose of making good this loss. The principle underlying relief in equity is that the defendant has improperly received or withheld property, or profits from property (such property or profits belonging to the claimant) and he is required to restore the property or to account for the profits<sup>1</sup>. The obligation of a defaulting trustee is essentially that of effecting restitution to the trust estate<sup>2</sup>. Thus at law the extent of the remedy is measured by the loss to the claimant, which is covered by the damages awarded; in equity the extent of the remedy is measured by the gain to the defendant, which is ascertained by directing an account against him<sup>3</sup>. These two measures may have quite different results<sup>4</sup>. Hence, where damages were claimed, the appropriate remedy was at law, and equity declined jurisdiction<sup>5</sup>; and prima facie this was so in cases of breach of contract, and in ordinary cases of fraud<sup>6</sup>. The remedy of specific performance in equity might carry, as incidental to it, a right to compensation<sup>7</sup>; but, apart from statute, ordinary damages could not be given, either in substitution for, or in addition to, specific performance<sup>8</sup>. A breach of trust does not give a remedy in damages, but a remedy by making the trustee restore the property with which he is chargeable, and account for profits which he has made, or which he is to be taken to have made<sup>9</sup>. If specific restitution of the trust property is not possible, the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed. Although the common law rules of remoteness of damage and causation do not apply, there does have to be some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable, namely the fact that the loss would not have occurred but for the breach<sup>10</sup>. The same considerations apply to a claim for breach of fiduciary duty; fiduciary duties are equitable extensions of trust duties<sup>11</sup>. An agent is accountable in equity to his principal for secret profits which he has made<sup>12</sup>.

The same principle attended the grant of injunctions; and an injunction against breach of copyright or infringement of patent was accompanied by an account of the profits made by the defendant, not of the actual loss to the plaintiff<sup>13</sup>. All divisions of the High Court have jurisdiction to give damages, and hence a claimant has his option either to have an account of profits or to have damages, but he cannot have both. If he takes an account of profits, he condones the infringement<sup>14</sup>.

1 'The Court of Chancery never entertained a suit for damages occasioned by fraudulent conduct or for breach of trust. The suit was always for an equitable debt or liability in the nature of a debt. It was a suit for the restitution of the actual money or thing, or value of the thing, of which the cheated party had been cheated': *Re Collie, ex p Adamson*(1878) 8 ChD 807 at 819, CA. In *Seager v Copydex Ltd (No 2)*[1969] 2 All ER 718, [1969] 1 WLR 809, CA, damages for breach of confidence were assessed on the market value of the information as between a willing buyer and a willing seller. See PARA 414 ante. As to the protection by equity of confidential information see PARA 855 post.

2 *Bartlett v Barclays Bank Trust Co Ltd (No 2)*[1980] Ch 515, [1980] 2 All ER 92 (where Brightman LJ observed that in some circumstances the obligation was not readily distinguishable from damages).

3 As to the principles of law relating to damages see DAMAGES.

4 *Nelson v Bridges* (1839) 2 Beav 239 at 243-244 per Lord Langdale MR.

5 *Clifford v Brooke* (1806) 13 Ves 131; *Blore v Sutton* (1817) 3 Mer 237 at 248; Story *Equity Jurisprudence* s 794. Alternatively equitable relief might be granted so far as appropriate without prejudice to an action for damages: *Gwillim v Stone* (1807) 14 Ves 128. Equity did not interfere with damages at law on the ground of their being excessive: *Hooker v Arthur* (1671) 2 Rep Ch 62.

6 *Newham v May* (1824) 13 Price 749 at 751-752; and see *Twycross v Grant* (1877) 2 CPD 469, CA.

7 *Newham v May* (1824) 13 Price 749 at 752. See, however, *Phelps v Prothero* (1855) 7 De GM & G 722 at 734 per Turner LJ ('the plaintiff ... having sued in equity for specific performance was bound ... to submit his claim for damages to the judgment of this court [the Court of Appeal in Chancery] and was not entitled to proceed at law otherwise than by leave of this court'). Compensation is ordinarily to be sought at law and cannot be obtained in equity: *Clinan v Cooke* (1802) 1 Sch & Lef 22 at 25.

8 See *Todd v Gee* (1810) 17 Ves 273; *Sainsbury v Jones* (1839) 5 My & Cr 1; and as to the statutory jurisdiction to give damages in addition to or in lieu of an injunction or specific performance see PARA 410 note 4 ante; and CIVIL PROCEDURE vol 11 (2009) PARA 364 et seq. In some circumstances, however, it seems that equity might award monetary compensation for the infringement of an equitable obligation: see *Day v Mead* [1987] 2 NZLR 443.

9 *Ludlow Corpn v Greenhouse* (1827) 1 Bli NS 17 at 58, HL; *Re Collie, ex p Adamson* (1878) 8 ChD 807, CA; *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515, [1980] 2 All ER 92 (no deduction in respect of tax which would have been payable if no breach of trust had been committed). Since the remedy is by way of account, it is not in the nature of a penal remedy: see *A-G v Alford* (1855) 4 De GM & G 843 at 851; *Re Barclay, Barclay v Andrew* [1899] 1 Ch 674 at 683. It follows that the beneficiary, obtaining the benefit of the breach of trust, may be better off than if the breach of trust had not been committed: see *Greenlaw v King* (1841) 5 Jur 18 at 19 per Lord Cottenham LC. See TRUSTS vol 48 (2007 Reissue) PARA 1099 et seq.

10 *Target Holdings Ltd v Redferns (a firm)* [1996] AC 421, [1995] 3 All ER 785, HL. A beneficiary who subsequent to the breach receives a benefit from the trustees' actions must give credit for it and cannot recover compensation if on balance he has suffered no loss: *Hulbert v Avens* [2003] EWHC 76 (Ch), [2003] WTLR 387, [2003] All ER (D) 309 (Jan). See also *Bristol and West Building Society v May May & Merrimans (a firm)* [1996] 2 All ER 801, [1996] 19 LS Gaz R 30; *Bristol and West Building Society v Mothew* [1998] Ch 1, [1996] 4 All ER 698, CA.

11 *Swindle v Harrison* [1997] 4 All ER 705, [1997] PNLR 641, CA; *Nationwide Building Society v Various Solicitors (No 3)* [1999] PNLR 606.

12 *Parker v McKenna* (1874) 10 Ch App 96 at 118; *Re Canadian Oil Works Corpn, Hay's Case* (1875) 10 Ch App 593; *Nordisk Insulinlaboratorium v Gorgate Products Ltd (sued as CL Bencard (1934) Ltd)* [1953] Ch 430 at 442-444, [1953] 1 All ER 986 at 991-992, CA. See AGENCY vol 1 (2008) PARA 91 et seq; COMPANIES vol 14 (2009) PARA 550.

13 *Hogg v Kirby* (1803) 8 Ves 215 at 223. Where the defendant, when manufacturing goods, made use of information given in confidence, an account was ordered of the profits made in the manufacture and sale of the goods: *Peter Pan Manufacturing Corpn v Corsets Silhouette Ltd* [1963] 3 All ER 402, [1964] 1 WLR 96; *A-G v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 174, [1988] 3 All ER 545, CA; affd [1990] 1 AC 109 at 233, [1988] 3 All ER 545, HL. Cf *Reading v A-G* [1951] AC 507, [1951] 1 All ER 617, HL. As to infringement of copyright see the Copyright, Designs and Patents Act 1988 s 96; *Infabrics Ltd v Jaytex Ltd* [1982] AC 1, [1981] 1 All ER 1057, HL; and COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 410. The 'plaintiff' in civil proceedings is now generally known as the 'claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

14 *Neilson v Betts* (1871) LR 5 HL 1; *De Vitre v Betts* (1873) LR 6 HL 319.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(3) EQUITY FOLLOWS THE LAW/554. Equity follows the law.

### **(3) EQUITY FOLLOWS THE LAW**

#### **554. Equity follows the law.**

Jurisdiction in equity is exercised upon the principle that equity follows the law. This maxim is, of course, not universally true, or there would never have been occasion for the development of a separate code of equitable principles<sup>1</sup>. It means that equity treats the common law as laying the foundation of all jurisprudence and does not depart unnecessarily from legal principles<sup>2</sup>. In matters coming before it which depend solely on legal rights, as in legal claims arising in the course of an administration claim, equity applies the rules of law as the appropriate system; in such cases the rules of law are in fact binding in equity. When equity has to regulate the equitable interests which it has itself created, it acts, so far as possible, on the analogy of the legal rules applicable to the corresponding legal interests, and departs from this analogy only in exceptional cases<sup>3</sup>.

1 'When the court finds the rules of law right, it will follow them; but then it will likewise go beyond them': *Paget v Gee* (1753) Amb 807 at 810 per Lord Hardwicke.

2 *Burgess v Wheate, A-G v Wheate* (1759) 1 Eden 177 at 195 per Clarke MR; and see *Sinclair v Brougham*[1914] AC 398 at 414-415, HL, per Lord Haldane LC; but note that much of the authority of this case has been undermined by *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[1996] AC 669, [1996] 2 All ER 961, HL.

3 'The law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue': *Cowper v Earl Cowper* (1734) 2 P Wms 720 at 753 per Jekyll MR; and see *Earl of Bath v Sherwin* (1709) 10 Mod Rep 1 at 3. More recently it has been said that the maxim is easily displaced: see *McKenzie v McKenzie*[2003] EWHC 601 (Ch) at [65], [2003] 2 P & CR D 15, [2003] All ER (D) 155 per Robert Hildyard QC, sitting as a deputy judge of the High Court.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(3) EQUITY FOLLOWS THE LAW/555. Application of the maxim.

### 555. Application of the maxim.

In relation to the limitations and incidents of equitable estates the rules of law were, before 1926, in general followed<sup>1</sup>, and departures from them were exceptional. Such exceptions occurred when equity declined to allow dower out of equitable estates, or to make an equitable contingent remainder depend for its validity on a sufficient preceding vested interest, or to allow an equitable estate to escheat<sup>2</sup>. Although the only legal estates which can now subsist are a fee simple absolute in possession and a term of years absolute<sup>3</sup>, yet there can still be equitable interests, such as an interest for life and an interest in remainder, corresponding to the legal estates which could formerly subsist<sup>4</sup>. Equity also followed the law as regards damages<sup>5</sup> and the limitation of actions, and it applied the statutes of limitation as a bar to equitable estates, either by way of analogy, or, as it was sometimes said, because they were binding on a court of equity<sup>6</sup>.

Where, as a result of an unauthorised disclosure, a litigant has a record of confidential communications in his possession, such communications not being privileged in legal proceedings, equity will not restrain him from using it for the purposes of his litigation. Equity follows the law and will not accord a de facto privilege to communications in respect of which no legal privilege may be claimed<sup>7</sup>. In relation to the writ *ne exeat regno*<sup>8</sup> the restrictions imposed by the Debtors Act 1869<sup>9</sup> apply by analogy on the principle that equity follows the law<sup>10</sup>.

Where a covenant is void at law, a court of equity will not attempt to enforce it by injunction. In such cases it is equity's duty to follow the law<sup>11</sup>.

1 See *Cowcher v Cowcher* [1972] 1 All ER 943, [1972] 1 WLR 425.

2 In the case of limitations of a trust estate, the fact that the legal estate was vested in the trustees was a sufficient protection to contingent remainders (*Hopkins v Hopkins* (1734) *Cas temp Talb* 44; *Fearne's Contingent Remainders* (10th Edn, 1844) p 304; *Abbiss v Burney, Re Finch* (1881) 17 ChD 211 at 229, CA; *Marshall v Gingell* (1882) 21 ChD 790); and thus a legal estate outstanding in a mortgagee preserved contingent remainders (*Astley v Micklethwait* (1880) 15 ChD 59 at 65).

Escheat for lack of a tenant was an incident of the legal estate, but it was not in equity made an incident of the equitable estate: see *A-G v Sands* (1670) *Hard* 488; *Burgess v Wheate* (1759) 1 Eden 177. In the case of an equity of redemption also, the legal estate and not the equity escheated (*Burgess v Wheate* supra at 256 per Henley Lord Keeper; *Fawcett v Lowther* (1751) 2 Ves Sen 300); but the lord, on the escheat of the legal estate, took it subject to the equity of redemption. In the event of the death of the mortgagor intestate and without heirs, the mortgagee was, however, entitled to hold the estate free from the equity of redemption unless it was required for the mortgagor's creditors, or unless the mortgagee, by suing the personal representatives for the mortgage debt, made himself liable to reconvey to them: *Burgess v Wheate* supra at 210 per Clarke MR and at 256 per Henley Lord Keeper; *Gordon v Gordon* (1821) 3 Swan 400 at 469-470. Escheat to the Crown or to a mesne lord for want of heirs has been abolished, and in default of any person to take under the present rules of distribution, the Crown takes the residuary estate as bona vacantia and in lieu of any right of escheat: see the Administration of Estates Act 1925 ss 45(1)(d), 46(1)(vi); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 170, 613-614, 627.

The refusal of equity to allow a wife dower out of an equitable estate appears to have been originally based on the same principle as the refusal to allow escheat. Dower was an incident of the legal estate, and was not made incident also to the equitable estate. Notwithstanding a decision of Jekyll MR in *Banks v Sutton* (1732) 2 P Wms 700 at 716-719, too many titles had been accepted on the faith of the existence of a trust being a protection against dower to allow of the rule being set aside, and dower was not admitted in the case either of a trust estate or of an equity of redemption existing at the date of the marriage: *Chaplin v Chaplin* (1733) 3 P Wms 229; *A-G v Scott* (1735) *Cas temp Talb* 138; *Godwin v Winsmore* (1742) 2 Atk 525; *D'Arcy v Blake* (1805) 2 Sch

& Lef 387. The position as to freebench was similar: *Forder v Wade* (1794) 4 Bro CC 520; *Smith v Adams* (1854) 5 De GM & G 712; cf *Godwin v Winsmore* supra. Dower and freebench have been abolished as regards the estates of persons dying after 1925: see the Administration of Estates Act 1925 s 45(1)(c); and PARA 468 ante.

3 See the Law of Property Act 1925 s 1(1); and REAL PROPERTY vol 39(2) (Reissue) PARA 45.

4 See ibid s 1(3); and REAL PROPERTY vol 39(2) (Reissue) PARA 46. As to the creation of entailed interests in real and personal property see REAL PROPERTY vol 39(2) (Reissue) PARA 117 et seq. See also *Walker v Hall* [1984] FLR 126 at 133, CA, per Dillon LJ. Since the commencement of the Trusts of Land and Appointment of Trustees Act 1996 on 1 January 1997, it has not been possible to create any new entailed interest in either real or personal property: see ss 2(6), 27(2), Sch 1 para 5, Sch 4.

5 *Malhotra v Choudhury* [1980] Ch 52, [1979] 1 All ER 186, CA; *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL; *Wroth v Tyler* [1974] Ch 30, [1973] 1 All ER 897; *Grant v Dawkins* [1973] 3 All ER 897, [1973] 1 WLR 1406.

6 See PARAS 910, 919, 920 post.

7 *Goddard v Nationwide Building Society* [1987] QB 670, [1986] 3 All ER 264, CA; *Webster v James Chapman & Co (a firm)* [1989] 3 All ER 939.

8 See PARA 495 ante.

9 See the Debtors Act 1869 s 6 (as amended) (arrest of defendant about to quit England).

10 *Felton v Callis* [1969] 1 QB 200, [1968] 3 All ER 673; *Al Nahkel for Contracting and Trading Ltd v Lowe* [1986] QB 235, [1986] 1 All ER 729.

11 *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co* [1894] AC 535 at 563, HL. Where there could be no action on the covenant at law because the same person was a party to it both as covenantor and covenantee, an action did not lie on the covenant in equity; if an equitable claim could be supported, it must be in respect of a liability existing independently of the covenant: *Ellis v Kerr* [1910] 1 Ch 529; *Napier v Williams* [1911] 1 Ch 361. Any covenant, whether express or implied, entered into by a person with himself and one or more other persons is to be construed and is capable of being enforced in like manner as if the covenant had been entered into with the other person or persons alone: Law of Property Act 1925 s 82(1). Section 82, although retrospective in effect (see s 82(2)), does not, however, make enforceable a building scheme which was insufficient before the Law of Property Act 1925: *Ridley v Lee* [1935] Ch 591; *Re Pinewood Estate, Farnborough* [1958] Ch 280, [1957] 2 All ER 517; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 264; and PARA 626 note 6 post. For further illustrations of the application of this maxim see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 23.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(4) EQUALITY IS EQUITY/556. Equality is equity.

## (4) EQUALITY IS EQUITY

### 556. Equality is equity.

The maxim that equality is equity<sup>1</sup> expresses in a general way the object both of law<sup>2</sup> and equity, namely to effect a distribution of property and losses proportionate to the several claims or to the several liabilities of the persons concerned<sup>3</sup>. Equality in this connection does not necessarily mean literal equality, but may mean proportionate equality<sup>4</sup>. This doctrine of equality, however, operated more effectually in a court of equity than a court of law<sup>5</sup>, and is exemplified in many departments of equity jurisdiction. Thus, in the distribution of property, the highest equity is to make an equality between parties standing in the same relation, though this cannot be done contrary to the plain meaning of a deed<sup>6</sup>.

Upon the same principle equity formerly intervened to set aside an illusory appointment and to compel an equal appointment under a power<sup>7</sup>, and the rule gave rise to the rateable distribution of equitable assets between specialty and simple contract creditors<sup>8</sup>.

Similarly a court of equity, more effectually than a court of law, adjusts losses so that they fall in due proportion upon the persons liable, and upon this equity is grounded the doctrine of contribution as between sureties<sup>9</sup>, and also other doctrines which are intended to apportion losses, such as average<sup>10</sup> and abatement of legacies; and perhaps the doctrines of marshalling<sup>11</sup> and refunding<sup>12</sup> also have the same origin.

1 Alternatively it may be rendered 'equity delights in equality'. The maxim in this form was attributed to Lord Somers LC: *Petit v Smith* (1695) 1 P Wms 7 at 8; and see *Re Dickens, Dickens v Hawksley*[1935] Ch 267 at 309, CA, per Maugham LJ. See also *Re Accrington Corpn Steam Tramways Co*[1909] 2 Ch 40 at 44 per Swinfen Eady J; *Hampton & Sons v Garrard Smith (Estate Agents) Ltd*[1985] 1 EGLR 23 at 24, CA, per Dillon LJ. In relation to employment disputes see *GW Wooding v Stoves Ltd*[1975] IRLR 198. In *Cox v Bankside* [1995] 2 Lloyd's Rep 437, CA, Peter Gibson LJ observed, at 463, that the maxim is not of universal applicability and that it always yields to a contrary intention, express or inferred.

2 In the form 'equity is equality' the maxim was current at law from the time of Bracton, but in this connection 'equity' appears to have referred to the equitable construction of statutes so as to include cases omitted by the legislature, though within the spirit of the statute; '*in paribus rationibus, paria jura*': Co Litt 24b; 2 Plowd 467. The law, however, recognised the equity of proportionate distribution of benefit and loss. '*In aequali jure* the law requires equality; one shall not bear the burden in ease of the rest, and the law is grounded in great equity': *Dering v Earl of Winchelsea* (1787) 1 Cox Eq Cas 318; 2 White & Tud LC (9th Edn) 488.

3 The doctrine and its limits, were considered by Lord Wilberforce in *McPhail v Doulton*[1971] AC 424 at 451, [1970] 2 All ER 228 at 242, HL ('equal division may be sensible and has been decreed, in cases of family trusts, for a limited class; here there is life in the maxim "equality is equity" but the cases provide numerous examples where this has not been so, and a different type of execution has been ordered, appropriate to the circumstances').

4 See *Ker v Ker*(1869) IR 4 Eq 15 at 28; *Steel v Dixon*(1881) 17 ChD 825 at 830; *Re Steel, Public Trustee v Christian Aid Society*[1979] Ch 218, [1978] 2 All ER 1026; *The Falcon* [1981] 1 Lloyd's Rep 13; *Re Unit 2 Windows Ltd*[1985] 3 All ER 647, [1985] 1 WLR 1383; *Bray (Inspector of Taxes) v Best*[1986] STC 96.

5 *Dering v Earl of Winchelsea* (1787) 1 Cox Eq Cas 318; 2 White & Tud LC (9th Edn) 488.

6 *Hulme v Chitty* (1846) 9 Beav 437 at 443 per Lord Langdale MR. In the distribution of assets among persons rateably entitled, those who have received part payment will not receive more until payments to the others have been levelled up: *Re Midland Express Ltd, Pearson v Midland Express Ltd*[1914] 1 Ch 41 at 48, CA; *Re Searle, Hoare & Co*[1924] 2 Ch 325. As to allowance on equitable principles of a fair and reasonable sum for

freight or charges where a contract of affreightment cannot be carried out owing to war see *The Iolo*[1916] P 206 at 212.

At one time, the court was particularly inclined to apply the principle of equality (meaning for these purposes literal equality) in cases of dispute between husband and wife as to their respective rights in property when each has contributed (eg out of a joint account: see *Jones v Maynard*[1951] Ch 572, [1951] 1 All ER 802) towards its purchase: see eg *Rimmer v Rimmer*[1953] 1 QB 63, [1952] 2 All ER 863, CA; *Cobb v Cobb*[1955] 2 All ER 696, [1955] 1 WLR 731, CA; *Fribance v Fribance*[1957] 1 All ER 357, [1957] 1 WLR 384, CA; *Macdonald v Macdonald*[1957] 2 All ER 690; *Pettitt v Pettitt*[1970] AC 777, [1969] 2 All ER 385, HL; and see *Re Cohen, National Provincial Bank Ltd v Katz*[1953] Ch 88, [1953] 1 All ER 378; cf *Silver v Silver*[1958] 1 All ER 523, [1958] 1 WLR 259, CA, where the matrimonial home was purchased in the wife's name and it was presumed to be a gift to her by the husband in the absence of evidence of a contrary intention. The strength of this presumption has, however, been much diminished with changing conditions of society: *Pettitt v Pettitt* supra at 793 and at 389 per Lord Reid, at 811 and at 404 per Lord Hodson and at 824 and at 414 per Lord Diplock. The same principles of property law apply to married and unmarried couples: *Pettitt v Pettitt* supra; *Gissing v Gissing*[1971] AC 886, [1970] 2 All ER 780, HL; and see *Bernard v Josephs*[1982] Ch 391, [1982] 3 All ER 162, CA. The principle has since been said to be applicable only as a last resort, in the absence of evidence as to the intention of the parties: see eg *Gissing v Gissing*[1971] AC 886, [1970] 2 All ER 780, HL; *Falconer v Falconer*[1970] 3 All ER 449, [1970] 1 WLR 1333, CA; *Hall v Hall*(1982) 3 FLR 379, CA; *Bernard v Josephs*[1982] Ch 391, [1982] 3 All ER 162, CA; *Burns v Burns*[1984] Ch 317, [1984] 1 All ER 244, CA; *B v B*[1988] 2 FLR 490; *Preston and Henderson v St Helens Metropolitan Borough Council* (1989) 58 P & CR 500, Lands Tribunal. See also *Grant v Edwards*[1986] Ch 638, [1986] 2 All ER 426, CA; *Midland Bank plc v Dobson and Dobson*[1986] 1 FLR 171, CA; *Lloyds Bank plc v Rosset*[1991] 1 AC 107, [1990] 1 All ER 1111, HL; *H v M*[1991] FCR 938, [1992] 1 FLR 229; *Mortgage Corp v Shaire*[2001] Ch 743, [2001] 4 All ER 364. In *Hammond v Mitchell*[1992] 2 All ER 109 at 119, [1991] 1 WLR 1127 at 1137 Waite J observed that this is not an area where this maxim 'falls to be applied unthinkingly'. See also MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 278 et seq. As to the distribution of property on divorce, and whether the wife is entitled to an equal distribution of assets to whose purchase price she has not directly contributed, see *White v White* [2001] 1 AC 596, [2001] 1 All ER 1, HL; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARAS 591, 601 et seq.

7 *Gibson v Kinven* (1682) 1 Vern 66; *Wall v Thorborne* (1686) 1 Vern 355, 414; and see *Craker v Parrott* (1677) 2 Cas in Ch 228 at 230. The court, if it has itself to exercise a power, does so on this principle: *Salisbury v Denton* (1857) 3 K & J 529 at 538; and see POWERS vol 36(2) (Reissue) PARAS 209, 212.

8 *Wolestoncroft v Long* (1663) 1 Cas in Ch 32; *Hixon v Wytham* (1675) 1 Cas in Ch 248; *Anon* (1681) 2 Cas in Ch 54.

9 *Dering v Earl of Winchelsea* (1787) 1 Cox Eq Cas 318; 2 White & Tud LC (9th Edn) 488. Early cases on the subject are *Peter v Rich* (1629) 1 Rep Ch 34; *Morgan v Seymour* (1638) 1 Rep Ch 120; *Swain v Wall* (1641) 1 Rep Ch 149. See further FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1165 et seq. Where a creditor has alternative remedies against different persons, equity intervenes to see that the burden falls on the right shoulders; if one is under a personal obligation to pay the debt, he must bear it: *Re Best, Parker v Best*[1924] 1 Ch 42. See further *Scholefield Goodman & Sons Ltd v Zyngier*[1986] AC 562, [1985] 3 All ER 105, PC; and PARA 459 ante.

10 See *Sheppard v Wright* (1698) Show Parl Cas 18; INSURANCE vol 25 (2003 Reissue) PARA 206 et seq; CARRIAGE AND CARRIERS vol 7 (2008) PARA 605 et seq.

11 *Lord Kennoule v Earl of Bedford* (1676) 1 Cas in Ch 295.

12 Francis, Maxims of Equity 9 et seq. As to the early doctrine of refunding see *Noel v Robinson* (1682) 1 Vern 90; but the doctrines both of marshalling and refunding illustrate the maxim only in the sense that they secure ultimately the proper distribution of property.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(4) EQUALITY IS EQUITY/557. Equity prefers a tenancy in common.

### **557. Equity prefers a tenancy in common.**

The preference of equity for a tenancy in common, which in many cases where transactions have been entered into jointly by parties has the effect of excluding the right of survivorship, furnishes several illustrations of cases where the maxim that equality is equity is applied. Thus, where persons purchase property with money provided by them in unequal shares and take the conveyance to themselves jointly, in the absence of special circumstances<sup>1</sup>, equity treats the property as belonging to them not as joint tenants but as tenants in common; and, although on the death of one the survivor or survivors holds or hold the entirety of the legal estate, yet in equity the survivor or survivors is or are considered as being trustees for the personal representatives of the deceased purchaser to the extent of his share in the purchase money<sup>2</sup>. Where, however, parties make a purchase jointly in equal shares, then, where no contrary intention is shown<sup>3</sup>, they are treated in equity, as at law, as joint tenants<sup>4</sup>.

The latter rule does not, however, apply where the purchase is made for the purpose of a joint undertaking or partnership either in trade or in any other dealing, for the right of survivorship is incompatible with the relationship of partners<sup>5</sup>, and in every such case, whether the purchase money is advanced equally or unequally, equity treats the parties as tenants in common with regard to their beneficial interests in the property<sup>6</sup>. Where persons advance money jointly on loan, whether equally or unequally, they are treated as tenants in common in equity with respect to their rights, whether the debt is secured by a mortgage<sup>7</sup> or is merely the subject of a personal contract<sup>8</sup>; and a joint account clause in a mortgage is not treated as necessarily excluding several titles to the mortgage money<sup>9</sup>. The cases in which joint tenants at law will be presumed in equity to hold the beneficial interest in property as tenants in common are not limited to three categories only, namely purchasers who contributed unequally, co-mortgagees or partners, since there are circumstances where it will be inferred by equity that the beneficial interest is intended to be held by the grantees as tenants in common, as, for example, where the grantees hold the premises for their several business purposes<sup>10</sup>.

Moreover, where property is vested in the parties as joint tenants in equity as well as at law, the joint tenancy is severed by a contract for sale<sup>11</sup> or other contract for value<sup>12</sup>. A legal joint tenancy in land cannot now be severed, but the joint tenancy can be severed in equity in the same manner as a joint tenancy in personal estate<sup>13</sup>.

1 *Harris v Fergusson* (1848) 16 Sim 308; and see *Cowcher v Cowcher* [1972] 1 All ER 943, [1972] 1 WLR 425.

2 *Lake v Gibson* (1729) 1 Eq Cas Abr 290; affd sub nom *Lake v Craddock* (1733) 3 P Wms 158; 2 White & Tud LC (9th Edn) 876; *Rigden v Vallier* (1751) 2 Ves Sen 252 at 258; *Robinson v Preston* (1858) 4 K & J 505.

3 *Robinson v Preston* (1858) 4 K & J 505.

4 *Lake v Gibson* (1729) 1 Eq Cas Abr 290; affd sub nom *Lake v Craddock* (1733) 3 P Wms 158; 2 White & Tud LC (9th Edn) 876; *Aveling v Knipe* (1815) 19 Ves 441; *Robinson v Preston* (1858) 4 K & J 505.

5 *Elliott v Brown* (1791) 3 Swan 489n.

6 *Jeffereys v Small* (1683) 1 Vern 217; *Lake v Gibson* (1729) 1 Eq Cas Abr 290; affd sub nom *Lake v Craddock* (1733) 3 P Wms 158; 2 White & Tud LC (9th Edn) 876. See also the Partnership Act 1890 ss 20, 21; and PARTNERSHIP vol 79 (2008) PARA 116 et seq.

- 7 *Petty v Styward* (1631) 1 Rep Ch 57; *Rigden v Vallier* (1751) 2 Ves Sen 252 at 258; *Morley v Bird* (1798) 3 Ves 628 at 631.
- 8 *Steeds v Steeds* (1889) 22 QBD 537 at 541, DC.
- 9 *Re Jackson, Smith v Sibthorpe* (1887) 34 ChD 732.
- 10 *Malayan Credit Ltd v Jack Chia-MPH Ltd* [1986] AC 549, [1986] 1 All ER 711, PC.
- 11 *Brown v Raindle* (1796) 3 Ves 256.
- 12 Eg such as an ante-nuptial marriage settlement: *Caldwell v Fellowes* (1870) LR 9 Eq 410; *Re Hewett, Hewett v Hallett* [1894] 1 Ch 362. The joint tenancy is not, however, severed by the marriage itself unless the effect is to vest the wife's interest in the husband: *Re Butler's Trusts, Hughes v Anderson* (1888) 38 ChD 286, CA.
- 13 See the Law of Property Act 1925 s 36(2) (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 198.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(5) HE WHO SEEKS EQUITY MUST DO EQUITY/558. He who seeks equity must do equity.

## **(5) HE WHO SEEKS EQUITY MUST DO EQUITY**

### **558. He who seeks equity must do equity.**

In granting relief peculiar to its own jurisdiction, a court of equity acts upon the rule that he who seeks equity must do equity<sup>1</sup>. By this it is not meant that the court may impose arbitrary conditions upon a claimant simply because he stands in that position on the record<sup>2</sup>. The rule means that a person who comes to seek the aid of a court of equity to enforce a claim must be prepared to submit in such proceedings to any directions which the known principles of a court of equity may make it proper to give<sup>3</sup>; and he must do justice as to the matters in respect of which the assistance of equity is asked<sup>4</sup>. In a court of law it is otherwise; when the claimant is found to be entitled to judgment, the law must take its course, and no terms may be imposed<sup>5</sup>.

1 'The principle of this court is not to give relief to those who will not do equity': *Davis v Duke of Marlborough* (1819) 2 Swan 108 at 157 per Lord Eldon LC; and see *Portsea Island Building Society v Barclay* [1895] 2 Ch 298 at 308, CA. In *Chappell v Times Newspapers Ltd* [1975] 2 All ER 233, [1975] 1 WLR 482, CA, the plaintiffs were refused injunctions to prevent the termination of their contracts of employment because they themselves failed to establish that they intended to act equitably in relation to those contracts. As to the application of the maxim to industrial disputes see *News Group Newspapers Ltd v Society of Graphical and Allied Trades '82 (No 2)* [1987] ICR 181, [1986] IRLR 337. 'Plaintiffs' are now known as 'claimants': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

2 *Hanson v Keating* (1844) 4 Hare 1 at 6.

3 *Colvin v Hartwell* (1837) 5 Cl & Fin 484 at 522; and see *Shish v Foster* (1748) 1 Ves Sen 88.

4 *Gibson v Goldsmid* (1854) 5 De GM & G 757 at 765. The equity to be observed by a person seeking equity must be an equity involved in the subject of the suit: *United States of America v McRae* (1867) 3 Ch App 79. On the same principle, effect will be given to a defence of equitable right only upon equitable terms. Thus a defendant setting up an equitable right to a lease must consent to accept a legal lease on the terms of the equitable lease (*Theellusson v Liddard* [1900] 2 Ch 635 at 646); and a defendant resorting to equity for his defence must take the equitable principles applicable to the circumstances in their entirety (*Steeds v Steeds* (1889) 22 QBD 537 at 541, DC). The proposition in the text to note 3 supra and to this note was approved as a correct statement of the law in *Re Berkeley Applegate (Investment Consultants) Ltd (in liq)*, *Harris v Conway* [1989] Ch 32 at 50, [1988] 3 All ER 71 at 83 per Edward Nugee QC (sitting as a deputy judge of the High Court).

5 *Deeks v Strutt* (1794) 5 Term Rep 690 at 693.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(5) HE WHO SEEKS EQUITY MUST DO EQUITY/559. Application of the maxim.

### 559. Application of the maxim.

On the basis of the general principle embodied in the maxim that he who seeks equity must do equity, where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property<sup>1</sup>. It is a discretion which will be sparingly exercised; but factors which will operate in favour of its being exercised include the fact that, if the work had not been done by the person to whom the allowance is sought to be made, it would have had to be done either by the person entitled to the equitable interest<sup>2</sup>, or by a receiver appointed by the court where fees would have been borne by the trust property<sup>3</sup>, and the fact that the work has been of substantial benefit to the trust property and to the persons interested in it in equity<sup>4</sup>.

The rule that he who seeks equity must do equity was probably the foundation of the doctrines of the consolidation<sup>5</sup> and tacking<sup>6</sup> of mortgages; and after the Statute of Frauds and prior to the Law of Property (Miscellaneous Provisions) Act 1989 a charge arising by way of deposit of deeds without any memorandum in writing was sometimes grounded on the same principle<sup>7</sup>. A borrower who seeks equitable relief against a security which is voidable in equity, or which is void by statute, obtains it only on the terms of paying the money which is properly due<sup>8</sup>. Similarly, when a purchase is set aside, this is on terms of repaying the purchase money with interest<sup>9</sup>; and a person who seeks an account must be prepared himself to account<sup>10</sup>.

1 *Re Berkeley Applegate (Investment Consultants) Ltd (in liq), Harris v Conway* [1989] Ch 32, [1988] 3 All ER 71. Under the old law, where a husband had to come into equity to recover property to which he was entitled in right of his wife, the court assisted him only on terms of his making a suitable settlement out of the property in favour of his wife: *Tidd v Lister* (1852) 10 Hare 140 at 153; *Sturgis v Champneys* (1839) 5 My & Cr 97 at 105; *Hanson v Keating* (1844) 4 Hare 1 at 4.

2 See *Re Marine Mansions Co* (1867) LR 4 Eq 601.

3 See *Scott v Nesbitt* (1808) 14 Ves 438; *Morrison v Morrison* (1855) 2 Sm & G 564.

4 See *Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721, HL.

5 *Mills v Jennings* (1880) 13 ChD 639 at 646, CA; on appeal sub nom *Jennings v Jordan* (1881) 6 App Cas 698, HL.

6 *St John v Holford* (1667) 1 Cas in Ch 97; *Lord Dacres v Crompe* (circa 1668) 2 Cas in Ch 87; *Bromley v Hamond* (1679) 2 Cas in Ch 23. Hence originally the mortgagee might tack a bond debt against the mortgagor: *Anon* (1698) 3 Salk 84. Subsequently this was not allowed, since the bond debt was not a charge on the land; and, although tacking was allowed as against an heir or devisee in whose hands the land was subject to payment of bond debts, this was put on the ground of avoiding circuity of action: see *Shuttleworth v Laycock* (1684) 1 Vern 245; *Troughton v Troughton* (1748) 1 Ves Sen 86; *Elvy v Norwood* (1852) 5 De G & Sm 240; *Coleman v Winch* (1721) 1 P Wms 775. Save in regard to the making of further advances in specified circumstances, tacking is abolished: see PARA 574 the text to notes 5-6 post; and MORTGAGE vol 77 (2010) PARA 264 et seq.

7 *Keys v Williams* (1838) 3 Y & C Ex 55 at 60. It was, however, more usually based on part performance: *Whitmore v Farley* (1881) 29 WR 825, CA. Note that as a consequence of the Law of Property (Miscellaneous Provisions) Act 1989 s 2(1), writing is now essential: see *United Bank of Kuwait plc v Sahib* [1997] Ch 107, [1996] 3 All ER 215, CA; and see PARA 606 post.

8 *Waller v Dale* (1677) 1 Cas in Ch 276; *Bill v Price* (1687) 1 Vern 467; *Mason v Gardiner* (1793) 4 Bro CC 436 at 438. Where a security was void under the Money-lenders Act 1900 s 2, the borrower, if he asked only for a



declaration that it was void, asserted a legal right, and was not put upon terms (*Chapman v Michaelson* [1909] 1 Ch 238, CA); but, if he went further and asked for equitable relief, as where he asked for the security to be given up, he had to be prepared to repay the loan (*Lodge v National Union Investment Co Ltd* [1907] 1 Ch 300). The Money-lenders Act 1900 s 2 was repealed by the Moneylenders Act 1927 (see s 1(3) (repealed)), but the same principle would apply in any case where a security is declared by statute to be void. Under the Consumer Credit Act 1974 s 40 (as amended) a regulated agreement (other than a non-commercial agreement), if made by a creditor while unlicensed, is in general unenforceable against the debtor or hirer: see s 40(1) (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 125. By analogy with cases on the Moneylenders Act 1927 s 6 (repealed), the debtor would appear to be entitled to the cancellation and delivery up of any security without being put on terms as to repayment of any sums still outstanding: see *Cohen v J Lester Ltd* [1939] 1 KB 504, [1938] 4 All ER 188; *Kasumu v Baba-Egbe* [1956] AC 539, [1956] 3 All ER 266, PC; *Barclay v Prospect Mortgages Ltd* [1974] 2 All ER 672, [1974] 1 WLR 837.

9 *Peacock v Evans* (1809-10) 16 Ves 512; and see *Priestly v Wilkinson* (1790) 1 Ves 214.

10 *Hanson v Keating* (1844) 4 Hare 1 at 5.

## UPDATE

### 559 Application of the maxim

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(6) HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS/560. He who comes into equity must come with clean hands.

## **(6) HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS**

### **560. He who comes into equity must come with clean hands.**

A court of equity refuses relief to a claimant whose conduct in regard to the subject matter of the litigation has been improper. This was formerly expressed by the maxim 'he who has committed iniquity shall not have equity'; and relief was refused where a transaction was based on the plaintiff's fraud or misrepresentation<sup>1</sup>, or where the plaintiff sought to enforce a security improperly obtained<sup>2</sup>, or where he claimed a remedy for a breach of trust which he had himself procured and whereby he had obtained money<sup>3</sup>. Later it was said that the plaintiff in equity<sup>4</sup> must come with perfect propriety of conduct<sup>5</sup>, or with clean hands<sup>6</sup>.

The maxim is not to be applied too rigorously. If it is shown that A has made a voluntary transfer of property into the name of B, intending to conceal his (A's) interest in the property for a fraudulent or illegal purpose, but nevertheless vesting the legal title in B<sup>7</sup>, it might be thought that the clean hands maxim would prevent A from asserting an equitable interest, whether the transaction took the form of a transfer of property by A to B, or the purchase of property by A in the name of B<sup>8</sup>. It is settled, however, that it depends upon whether A is forced to plead or rely on the fraudulent or illegal purpose. Thus if B is a stranger A can assert the resulting trust in his favour<sup>9</sup> and is not compelled to rely on the fraud or illegality: A can enforce his equitable interest even though the court may be aware of the fraudulent or illegal purpose, and even though this purpose has been carried out<sup>10</sup>. But if there is a presumption of advancement in favour of B, then A will not be allowed to rely on his fraudulent or illegal purpose to rebut it<sup>11</sup>. Even in this last case however, if A withdraws from the transaction before any part of the fraudulent or illegal purpose has been carried out, he will be permitted to give evidence of the fraud or illegality in order to rebut the presumption<sup>12</sup>.

The maxim does not mean that equity strikes at depravity in a general way; the cleanliness required is to be judged in relation to the relief sought<sup>13</sup>, and the conduct complained of must have an immediate and necessary relation to the equity sued for; it must be depravity in a legal, as well as in a moral, sense<sup>14</sup>. Thus fraud on the part of a minor deprives him of his right to equitable relief notwithstanding his disability<sup>15</sup>. Where the transaction is itself unlawful, it is not necessary to have recourse to this principle. In equity, just as at law, no suit lies in general in respect of an illegal transaction, but this is on the ground of its illegality, not by reason of the claimant's demerits<sup>16</sup>.

1 *Jones v Lenthall* (1669) 1 Cas in Ch 154; and see *Small v Brackley* (1702) 2 Vern 602; Francis, Maxims of Equity 5.

2 *Rich v Sydenham* (1671) 1 Cas in Ch 202. Relief was not given against a wilful forfeiture: *Thomas v Porter* (1668) 1 Cas in Ch 95. As to suppression of title deeds see *Gartside v Ratcliff* (1676) 1 Cas in Ch 292 (title presumed against party suppressing).

3 *Nail v Punter* (1832) 5 Sim 555.

4 The 'plaintiff' in civil proceedings is now generally known as the 'claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

5 *Harnett v Yielding* (1805) 2 Sch & Lef 549 at 554.

6 *Cadman v Horner* (1810) 18 Ves 10; *Viscount Clermont v Tasburgh* (1819) 1 Jac & W 112 at 121 (both cases where specific performance was refused on the ground of misrepresentation); *Roberts v Cooper*[1891] 2 Ch 335 at 344-345, CA (wife debarred by her conduct from equity to settlement). The maxim has sometimes been used as the equivalent of the principle that he who seeks equity must do equity: see *Fitzroy v Gwillim* (1786) 1 Term Rep 153, where it was said by Lord Mansfield CJ that in an equitable action the plaintiff must 'come with clean hands according to the principle that those who seek equity must do equity'. 'There must be some element of dishonesty or sharp practice in the matter relied upon for saying that he does not come with clean hands': *Loosley v National Union of Teachers*[1988] IRLR 157 at 162, CA, per Sir Denys Buckley. It has been said to represent 'a principle of justice designed to prevent those guilty of serious misconduct from securing a discretionary remedy, such as an injunction': *Dunbar (administrator of the estate of Dunbar) v Plant*[1998] Ch 412 at 422, [1997] 4 All ER 289 at 297, CA, per Mummery LJ. The maxim does not, of course, apply to a claim for damages at common law: *Hurley v Mustoe (No 2)* [1983] ICR 422, EAT. Recent cases in which the maxim has been treated as relevant include *Hubbard v Vosper*[1972] 2 QB 84, [1972] 1 All ER 1023, CA; *New Zealand Netherlands Society Oranje Inc v Kuys*[1973] 2 All ER 1222, [1973] 1 WLR 1126, PC; *Tulapam Properties Ltd v De Almeida* (1981) 260 Estates Gazette 919; *Cross v Cross*(1983) 4 FLR 235; *White Horse Distillers Ltd v Gregson Associates Ltd*[1984] RPC 61; *Nurcombe v Nurcombe*[1985] 1 All ER 65, [1985] 1 WLR 370, CA; *J Willis & Son v Willis*[1986] 1 EGLR 62, CA; *Euro-Diam Ltd v Bathurst*[1990] 1 QB 1, [1987] 2 All ER 113 (affd [1990] 1 QB 1 at 26, [1988] 2 All ER 23, CA); *Joint Receivers and Managers of Niltan Carson Ltd v Hawthorne*[1988] BCLC 298 at 326 per Hodgson J; and see *Peffer v Rigg*[1978] 3 All ER 745, [1977] 1 WLR 285; *Williams v Staite*[1979] Ch 291, [1978] 2 All ER 928, CA; *Wilton Group plc v Abrams* [1990] BCC 310; *Quadrant Visual Communications Ltd v Hutchison Telephone (UK) Ltd*[1993] BCLC 442, [1992] 3 LS Gaz R 31, CA (specific performance refused because of the plaintiff's reprehensible conduct in failing to disclose marketing agreement); *Wilkie v Redsell* [2003] All ER (D) 154 (Jun), CA (specific performance of agreement granting land to defendant refused on his counter-claim in possession proceedings, because he had sought to deny ownership of the land when giving evidence in criminal proceedings); *Gonthier v Orange Contract Scaffolding Ltd* [2003] EWCA Civ 873, [2003] All ER (D) 332 (Jun) (defendant unable to rely on proprietary estoppel as defendant's hands 'hopelessly muddled'). Cf *Moody v Cox and Hatt*[1917] 2 Ch 71 at 87, CA per Scrutton LJ ('I think the expression "clean hands" is used more often in the text books than it is in the judgments'); but it is doubtful whether this observation can be justified. See also *Ebrahimi v Westbourne Galleries Ltd*[1973] AC 360 at 387, [1972] 2 All ER 492 at 507, HL, per Lord Cross of Chelsea (a petitioner who relied on the 'just and equitable' ground in the Companies Act 1948 s 222(f) (repealed: see now the Insolvency Act 1986 s 122(1)(g); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 444) must come to court with clean hands); but see *Re London School of Electronics Ltd*[1986] Ch 211, [1985] BCLC 273; and see generally [1990] Conv 416.

7 The mere fact that a transaction is illegal does not have the effect of preventing property passing under it. This is so both at law (see eg *Sajan Singh v Sardara Ali*[1960] AC 167, [1960] 1 All ER 269, PC) and in equity (see eg *Ayerst v Jenkins*(1873) LR 16 Eq 275).

8 This indeed was the opinion of Lord Goff of Chieveley in his dissenting speech in *Tinsley v Milligan*[1994] 1 AC 340, [1993] 3 All ER 65, HL.

9 Note the doubt as to whether there is, as a consequence of the Law of Property Act 1925 s 60(3), a resulting trust on a voluntary conveyance of land: see *Hodgson v Marks*[1971] Ch 892, [1971] 2 All ER 684, CA; *Tinsley v Milligan*[1994] 1 AC 340 at 317, [1993] 3 All ER 65 at 87, HL, per Lord Browne-Wilkinson.

10 *Tinsley v Milligan*[1994] 1 AC 340, [1993] 3 All ER 65, HL (T and M jointly purchased a house in the name of T alone so as to enable M to make, successfully, fraudulent claims to the Department of Social Security for benefits. In fact M did not make use of the conveyance for this purpose and by the time of the trial had 'made her peace with the DSS'), applied in eg *Lowson v Coombes*[1999] Ch 373, [1999] 2 FCR 731, CA; *Mortgage Express v Robson*[2001] EWCA Civ 887, [2001] 2 All ER (Comm) 886, [2002] 1 FCR 162; cf *Collier v Collier*[2002] EWCA Civ 1095, [2002] All ER (D) 466 (Jul).

11 *Tinsley v Milligan*[1994] 1 AC 340, [1993] 3 All ER 65, HL; *Gascoigne v Gascoigne*[1918] 1 KB 223, DC (property purchased in wife's name to defeat creditors; presumption of gift to wife would not be rebutted); *Re Emery's Investments Trusts, Emery v Emery*[1959] Ch 410, [1959] 1 All ER 577 (shares transferred into wife's name to avoid United States tax; presumption of advancement could not be rebutted); *Tinker v Tinker*[1970] P 136, [1970] 1 All ER 540, CA (house bought in wife's name so that business creditors could not claim it; house belonged to wife absolutely). *Cantor v Cox* (1975) 239 Estates Gazette 121 can no longer be relied on in the light of *Tinsley v Milligan* supra. The principle was held not to apply where the defendants to an action for specific performance had affirmed a contract which might have been set aside on the ground of bribery by the plaintiff (*Moody v Cox and Hatt*[1917] 2 Ch 71, CA); and it is no defence against a claim for infringement of copyright that the owner of the copyright itself infringes the copyright of others (*British Leyland Motor Corp v Armstrong Patents Co Ltd*[1986] RPC 279, CA; revsd without comment on this point [1986] RPC 279, HL). See also *Singh v Singh* [1985] Fam Law 97 ('clean hands' defence failed where its success would prejudice innocent third party). 'As with all maxims it is not to be applied blindly and without reference to the facts of the given case': *Van Gestel v Cann*(1987) Times, 7 August, CA, per May LJ.

12 *Tribe v Tribe*[1996] Ch 107, [1995] 4 All ER 236, CA. The Australian, but not the English, courts have considered the question whether the claimant should be put on terms to reimburse any person defrauded: *Nelson v Nelson* (1995) 132 ALR 133. See also *Rowan v Dann* (1991) 64 P & CR 202, [1991] EGCS 138, CA (improper purpose common to both sides; entitled to resile where purpose had not been carried out).

13 *Duchess of Argyll v Duke of Argyll*[1967] Ch 302 at 332, [1965] 1 All ER 611 at 626; *Attwood v Small* (1838) 6 Cl & Fin 232 at 447-448 per Lord Brougham; *Griffiths v Griffiths*[1973] 3 All ER 1155; *Sang Lee Investment Co Ltd v Wing Kwai Investment Co Ltd* (1983) 127 Sol Jo 410, PC (where improprieties on both sides, court does not have to carry out a balancing exercise); *Van Gestel v Cann*(1987) Times, 7 August, CA.

14 *Dering v Earl of Winchelsea* (1787) 1 Cox Eq Cas 318 at 319 per Eyre CB; *Grobbelaar v News Group Newspapers Ltd*[2002] UKHL 40, [2002] 4 All ER 732, [2002] 1 WLR 3024; cf *Jones v Lenthall* (1669) 1 Cas in Ch 154 (where it is said by the reporter that the iniquity must be done by the defendant himself).

15 *Overton v Banister* (1844) 3 Hare 503; *Nelson v Stocker* (1859) 4 De G & J 458 at 465.

16 Thus proceedings in equity are not maintainable in respect of a gambling transaction made unlawful by statute (see *Quarrier v Colston* (1842) 1 Ph 147), or where the intended use of property is immoral (*Smith v White*(1866) LR 1 Eq 626), or where the claim is against an illegal company (*Re South Wales Atlantic Steamship Co*(1876) 2 ChD 763, CA), or is to protect the copyright in a libellous or immoral publication (*Walcot v Walker* (1802) 7 Ves 1; *Southey v Sherwood* (1817) 2 Mer 435; *Murray v Benbow* (1822) Jac 474n; *Glyn v Weston Feature Film Co*[1916] 1 Ch 261) or to enforce a contract which is against public policy (*Thomson v Thomson* (1802) 7 Ves 470), where eg it is an agreement involving the abandonment of a criminal prosecution (*Whitmore v Farley* (1881) 29 WR 825, CA; *Windhill Local Board of Health v Vint*(1890) 45 ChD 351, CA). The objection that a bond given in consideration of future cohabitation is void prevails equally at law and in equity; and, if the illegal consideration appears on the face of the instrument, relief is not given against it: *Gray v Mathias* (1800) 5 Ves 286. If the illegal consideration had to be proved by evidence outside the instrument, discovery was formerly granted in aid of this defence at law: *Benyon v Nettlefold* (1850) 3 Mac & G 94; cf *Franco v Bolton* (1797) 3 Ves 368. In general, in such cases, the defendant is protected by the maxims *ex turpi causa non oritur actio* ('no right of action arises from a bad cause'), and *in pari delicto melior est conditio possidentis* ('where both parties are equally in the wrong, he who is in possession is in the favourable position'), which apply both in equity and at law; and the principle that equity requires clean hands does not prevent the defendant from pleading the illegality, if he does not also require to set up any equity on his own account: *Moulis v Owen*[1907] 1 KB 746, CA. A beneficiary under a trust is entitled to enforce it even though he was a party to the illegality which brought it into being: *Ayerst v Jenkins*(1873) LR 16 Eq 275 at 282, CA, per Lord Selborne LC; *Tinsley v Milligan*[1994] 1 AC 340, [1993] 3 All ER 65, HL; and see *Re Vallance*, *Vallance v Blagden*(1884) 26 ChD 353; *Phillips v Probyn*[1899] 1 Ch 811; and cf *Batty v Chester* (1842) 5 Beav 103. As to delivery up of deeds founded on illegal considerations see *Hayward v Dimsdale* (1810) 17 Ves 111; *Simpson v Lord Howden* (1837) 3 My & Cr 97; *Lound v Grimwade*(1888) 39 ChD 605; and see also PARAS 485-486 ante. As to the limits of the maxim *ex turpi causa non oritur actio* see *Gordon v Metropolitan Police Chief Comr*[1910] 2 KB 1080, CA.

## UPDATE

### 560 He who comes into equity must come with clean hands

NOTE 6--See also *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)*[2008] EWCA Civ 644, [2009] 1 AC 1391, [2008] 3 WLR 1146, [2008] All ER (D) 225 (Jun) (company's negligence claim against auditors barred as dishonesty of company's sole human agent imputed to company itself); affirmed [2009] UKHL 39, [2009] 1 AC 1391, [2009] 4 All ER 431.

NOTE 10--*Tinsley* applied in *Lilly Icos LLC v 8PM Chemist Ltd*[2009] EWHC 1905 (Ch), [2010] FSR 95, [2009] All ER (D) 360 (Jul) (interim injunction made against parallel re-exporter of claimants' pharmaceutical products subject to cross-undertaking in damages; fact that importer then supplied products directly to patients contrary to laws of third country did not prevent re-exporter from enforcing cross-undertaking in damages).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(7) EQUITY LOOKS ON THAT AS DONE WHICH OUGHT TO BE DONE/561. Equity looks on that as done which ought to be done.

## **(7) EQUITY LOOKS ON THAT AS DONE WHICH OUGHT TO BE DONE**

### **561. Equity looks on that as done which ought to be done.**

Equity looks on that as done which ought to be done or which is agreed to be done, but this maxim does not extend to things which might have been done; nor will equity apply it in favour of everybody, but only of those who had a right to pray that the thing should be done<sup>1</sup>. Thus, where the obligation arises from contract, that which ought to be done is treated as done only in favour of some person entitled to enforce the contract as against the person liable to perform it<sup>2</sup>. The true meaning of the maxim is that equity will treat the subject matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been done exactly as they ought to have been<sup>3</sup>, but the contract itself is not varied. The doctrine does not make for the parties contracts different from those they have made for themselves<sup>4</sup>.

The leading examples of the application of the maxim are in cases where land has been directed to be turned into money, and vice versa; and where a contract remains executory on one side but has been executed on the other. The application of the maxim in cases of the first kind gave rise to the doctrine of conversion which had the effect of altering the very nature of things, to make money land, and, on the contrary, to turn land into money<sup>5</sup>. This doctrine was shorn of much of its practical importance by the Administration of Estates Act 1925<sup>6</sup>, and was partially abolished by the Trusts of Land and Appointment of Trustees Act 1996<sup>7</sup>.

1 *Burgess v Wheate, A-G v Wheate* (1759) 1 Eden 177 at 186 per Clarke MR. As to the maxim that equity imputes an intention to fulfil an obligation see PARA 754 post.

2 *Re Anstis, Chetwynd v Morgan, Morgan v Chetwynd* (1886) 31 ChD 596 at 605, CA, per Lindley LJ; *Re Plumptre's Marriage Settlement, Underhill v Plumptre* [1910] 1 Ch 609 at 619; and see *Hobbs v Marlowe* [1978] AC 16 at 42, [1977] 2 All ER 241 at 257, HL, per Lord Simon of Glaisdale.

3 1 Fonblanque's Treatise of Equity (5th Edn, 1820) p 419; Story, Equity Jurisprudence s 64(g). See also *Re E Dibbens & Sons (in liq)* [1990] BCLC 577. The rule was said by Lord Hardwicke LC to hold in every case except in dower: *Crabtree v Bramble* (1747) 3 Atk 680 at 687.

The analogy between legal and equitable estates did not, however, in strictness apply as regards dower, which was incident to the legal estate: see PARA 555 note 2 ante.

4 'The doctrine cannot in its application to contracts ... be permitted to turn the conditional into the absolute, the optional into the obligatory, or to make for the parties contracts different from those they have made for themselves. What a party to a contract ought to do, within the true meaning of this doctrine, is what he has contracted to do, and nothing more and nothing less is to be taken in the equity to be done': *De Beers Consolidated Mines Ltd v British South Africa Co* [1912] AC 52 at 65-66, HL, per Lord Atkinson; *Wood Preservation Ltd v Prior (Inspector of Taxes)* [1968] 2 All ER 849, [1969] 1 WLR 1077; affd [1969] 1 All ER 364, [1969] 1 WLR 1077 at 1094, CA.

5 *Lechmere v Earl of Carlisle* (1735) 3 P Wms 211 at 215 per Jekyll MR; *A-G v Hubbuck* (1884) 13 QBD 275 at 289, CA per Bowen LJ. As to the application of the maxim to contracts for the sale of land see PARAS 611-612 post.

6 See the Administration of Estates Act 1925 s 33 (now as amended); and EXECUTORS AND ADMINISTRATORS.

7 See the Trusts of Land and Appointment of Trustees Act 1996 s 3(1); and PARA 701 et seq post.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(7) EQUITY LOOKS ON THAT AS DONE WHICH OUGHT TO BE DONE/562. Application of the maxim.

## 562. Application of the maxim.

Where, for example, possession is held under an agreement for a lease, of which specific performance would be ordered, the parties are treated in equity as being in the same position with regard to their respective rights as if a lease had been granted<sup>1</sup>; and likewise where a tenant has entered into possession under an agreement which is embodied in a consent order of the court<sup>2</sup>. Similarly, money which would have been payable under a contract if the defendant had not wrongfully prevented anything from becoming due will be treated as a debt in equity, although it is not a debt at law<sup>3</sup>.

Upon the same principle is based the efficacy of an assignment of after-acquired property. Neither in equity nor at law can there be an assignment of what has no existence. The assignment operates as a contract; and, if it is for value, then, when the property comes into existence, equity, treating that as done which ought to be done, fastens upon the property, and the contract to assign becomes in equity a complete assignment<sup>4</sup>. Where an agreement has been entered into by a company with a clear intention of creating a charge, a charge will be held to be established notwithstanding defects of form, if the transaction is *intra vires*<sup>5</sup>; and it may be *intra vires* to the extent to which the company has actually received money, and *ultra vires* as regards money advanced upon it to some other company<sup>6</sup>.

The ability of beneficiaries who have given value to enforce an incompletely constituted trust has also been based on the maxim<sup>7</sup>.

1 *Walsh v Lonsdale* (1882) 21 ChD 9, CA; *Zimble v Abrahams* [1903] 1 KB 577, CA; *Gray v Spyer* [1922] 2 Ch 22, CA; *Tinsley v Milligan* [1994] 1 AC 340 at 370, [1993] 3 All ER 65 at 86, HL, per Lord Browne-Wilkinson; *Jerome v Kelly (Inspector of Taxes)* [2002] EWCA Civ 1879, [2003] STC 206, [2003] 24 EG 163; and see PARA 501 ante. The maxim may be applied twice, eg where V agrees to sell to P, who agrees to grant a lease to T: *Industrial Properties (Barton Hill) Ltd v Associated Electrical Industries Ltd* [1977] QB 580, [1977] 2 All ER 293, CA.

2 *Tottenham Hotspur Football & Athletic Co Ltd v Princegrove Publishers Ltd* [1974] 1 All ER 17, [1974] 1 WLR 113.

3 *London, Chatham and Dover Rly Co v South Eastern Rly Co* [1892] 1 Ch 120 at 143, CA.

4 *Collyer v Isaacs* (1881) 19 ChD 342 at 351, CA, per Jessel MR; and see *Langton v Horton* (1842) 1 Hare 549; *Holroyd v Marshall* (1862) 10 HL Cas 191. As to a covenant in a marriage settlement to settle after-acquired property see *Pullan v Koe* [1913] 1 Ch 9; and SETTLEMENTS vol 42 (Reissue) PARA 644 et seq; and as to the assignment of an expectancy see *Re Lind, Industrials Finance Syndicate Ltd v Lind* [1915] 2 Ch 345, CA. See also PARA 645 post.

5 *Re Strand Music Hall Co* (1865) 3 De GJ & Sm 147; *Ross v Army and Navy Hotel Co* (1886) 34 ChD 43, CA; *Re Queensland Land and Coal Co, Davis v Martin* [1894] 3 Ch 181; *Pegge v Neath and District Tramways Co Ltd* [1898] 1 Ch 183; *Re Fireproof Doors Ltd, Umney v Fireproof Doors Ltd* [1916] 2 Ch 142; *Cox v Dublin City Distillery (No 2)* [1915] 1 IR 345. In such cases the transaction takes effect in accordance with the maxim 'equity looks at the intent rather than the form'. Regard must now be had to the statutory requirement of registration: see COMPANIES vol 15 (2009) PARA 1279; and *Re Kent and Sussex Sawmills Ltd* [1947] Ch 177, [1946] 2 All ER 638. The validity of an act done by a company may not now be called into question on the ground of lack of capacity by reason of anything in the company's memorandum: see PARA 774 the text and note 5 post.

6 *Re Johnston Foreign Patents Co Ltd, Re Johnston Die Press Co Ltd, Re Johnstonia Engraving Co Ltd, JP Trust Ltd v Johnston Foreign Patents Co Ltd and Johnston Die Press Co Ltd and Johnstonia Engraving Co Ltd* [1904] 2 Ch 234, CA; and see COMPANIES vol 15 (2009) PARA 1260.

7     *Davis v Richards and Wallington Industries Ltd* [1991] 2 All ER 563, [1990] 1 WLR 1511.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(8) EQUITY DOES NOT ALLOW A STATUTE TO BE MADE AN INSTRUMENT OR ENGINE OF FRAUD/563. Equity does not allow a statute to be made an instrument or engine of fraud.

## **(8) EQUITY DOES NOT ALLOW A STATUTE TO BE MADE AN INSTRUMENT OR ENGINE OF FRAUD**

### **563. Equity does not allow a statute to be made an instrument or engine of fraud.**

Equity does not allow a statute to be made an instrument of fraud<sup>1</sup>. Hence, although trusts of land can be created only in writing<sup>2</sup>, a person who takes real estate by instrument inter vivos in pursuance of a parol arrangement, of which he was cognisant, that the property should be held by him upon trust, is not allowed to use the statute as a means of avoiding the performance of the trust. A court of equity does not set aside the statute, but it fastens on the individual who obtains a title under it, and imposes on him a personal obligation because he applies the statute as an instrument for accomplishing a fraud<sup>3</sup>.

Where a person takes real or personal estate upon an intestacy or under a will in pursuance of a like parol arrangement that the property should be held by him on trust, it was at one time thought that the statutory provisions requiring testamentary dispositions to be in writing<sup>4</sup> applied to the trust, and that the maxim should be brought into play to enable the secret trust to be enforced<sup>5</sup>. While this is doubtless the origin of secret trusts, the more recent cases appear to establish that there is no conflict between the enforcement of such a trust and the statutory provisions, since the trust operates outside or, as it is said, 'dehors' the will. The statutory provisions apply only to the disposition to the secret trustee<sup>6</sup>.

1 *Re Duke of Marlborough, Davis v Whitehead*[1894] 2 Ch 133 at 141; *Puttick v A-G*[1980] Fam 1; sub nom *Puttick v A-G and Puttick*[1979] 3 All ER 463 (where at 22 and at 480 the text to this note was cited with approval); *Steadman v Steadman*[1976] AC 536 at 558, [1974] 2 All ER 977 at 996, HL, per Lord Simon of Glaisdale.

2 See the Law of Property Act 1925 s 53(1)(b) (replacing the Statute of Frauds (1677) s 7); and TRUSTS vol 48 (2007 Reissue) PARA 644.

3 *McCormick v Grogan*(1869) LR 4 HL 82 at 89 per Lord Hatherley and at 97 per Lord Westbury; *Jones v Badley*(1868) 3 Ch App 362 at 364 per Lord Cairns. These cases remain authorities on the principle although secret trusts are no longer thought to depend on the maxim: see the text and note 6 infra. See also *Longfield Parish Council v Robson* (1913) 29 TLR 357 (oral trust of land enforced, although the point was not expressly taken). As to secret trusts see TRUSTS vol 48 (2007 Reissue) PARAS 672-677.

4 See the Wills Act 1837 s 9 (now substituted by the Administration of Justice Act 1982 s 17); see WILLS vol 50 (2005 Reissue) PARA 351 et seq.

5 See eg *Jones v Badley*(1868) 3 Ch App 362 at 364 per Lord Cairns; *McCormick v Grogan*(1869) LR 4 HL 82 at 89 per Lord Hatherley and at 97 per Lord Westbury.

6 *Cullen v A-G for Ireland*(1866) LR 1 HL 190 at 198 per Lord Westbury; *Re Gardner, Huey v Cunningham*[1923] 2 Ch 230; *Blackwell v Blackwell*[1929] AC 318, HL; *Re Young, Young v Young*[1951] Ch 344, [1950] 2 All ER 1245; *Re Snowden*[1979] Ch 528 at 534-535; sub nom *Re Snowden, Smith v Spowage*[1979] 2 All ER 172 at 177 per Megarry V-C.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(8) EQUITY DOES NOT ALLOW A STATUTE TO BE MADE AN INSTRUMENT OR ENGINE OF FRAUD/564. Application of the maxim.

### 564. Application of the maxim.

Where a conveyance has been made upon an oral arrangement that the grantee shall in certain events reconvey, a reconveyance can be required notwithstanding the failure to comply with the statutory requirements<sup>1</sup>; and, where the arrangement is that the grantee shall hold in trust for the grantor<sup>2</sup>, or for another person<sup>3</sup>, the trust will be enforced. Upon the same ground a conveyance absolute in form has been held to be a mortgage<sup>4</sup>, and an agent for purchase appointed by parol has not been allowed to retain the benefit of the purchase against his principal<sup>5</sup>.

1 The Law of Property Act 1925 s 53(1)(b) (see PARA 563 the text to note 2 ante); and see *Hutchins v Lee* (1737) 1 Atk 447; *Davies v Otty* (1865) 35 Beav 208; *Haigh v Kaye* (1872) 7 Ch App 469 at 474 per James LJ ('it is clear that the Statute of Frauds was never intended to prevent the court of equity from giving relief in a case of plain, clear and deliberate fraud'); *Re Duke of Marlborough, Davis v Whitehead* [1894] 2 Ch 133.

2 *Booth v Turle* (1873) LR 16 Eq 182; *Bannister v Bannister* [1948] 2 All ER 133, CA; *Hodgson v Marks* [1971] Ch 892, [1970] 3 All ER 513; revsd [1971] 892 at 918, [1971] 2 All ER 684, CA.

3 *Rochefoucauld v Boustead* [1897] 1 Ch 196 at 206, CA; and see *Lys v Prowsa Developments Ltd* [1982] 2 All ER 953, [1982] 1 WLR 1044.

4 *Lincoln v Wright* (1859) 4 De G & J 16.

5 *Heard v Pilley* (1869) 4 Ch App 548, CA; but see *James v Smith* [1891] 1 Ch 384, CA. The doctrine of part performance excluding the Statute of Frauds (1677) s 4 (replaced by the Law of Property Act 1925 s 40(1) (repealed)) was based upon the same principle: *Frame v Dawson* (1807) 14 Ves 386; *Caton v Caton* (1866) 1 Ch App 137 at 148; *Steadman v Steadman* [1976] AC 536 at 540, [1974] 2 All ER 977 at 981, HL, per Lord Reid and at 558 and at 996 per Lord Simon of Glaisdale; *Clipper Maritime Ltd v Shirlstar Container Transport Ltd, The Anemone* [1987] 1 Lloyd's Rep 546; but cf *Maddison v Alderson* (1883) 8 App Cas 467 at 476, HL, per Lord Selborne LC. The doctrine of part performance was in effect abolished by the Law of Property (Miscellaneous Provisions) Act 1989: see ss 2(8), 4, Sch 2; and REAL PROPERTY. See also SPECIFIC PERFORMANCE.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(9) EQUITY FAVOURS A PURCHASER FOR VALUE WITHOUT NOTICE/565. Plea of purchase for value without notice.

## **(9) EQUITY FAVOURS A PURCHASER FOR VALUE WITHOUT NOTICE**

### **565. Plea of purchase for value without notice.**

The plea of purchase for value without notice is looked upon with favour in equity<sup>1</sup>. It is available to a purchaser who has obtained the legal estate, and will usually give him priority over equitable claims which rank before him in point of time; and it is also available, without the legal estate, against equities as distinguished from equitable interests<sup>2</sup>.

The plea of purchase for value without notice was originally available against both equitable and legal claims<sup>3</sup>, but it came to be restricted to cases where the defendant himself had the legal estate<sup>4</sup>, or where the legal owner was suing, under the auxiliary jurisdiction in equity, to obtain assistance, such as discovery, in his action at law. Hence in later times the plea was admitted neither against an equitable claimant<sup>5</sup> nor against a legal owner who sued on his legal title under the concurrent jurisdiction in equity<sup>6</sup>, or who sued in equity for an equitable remedy, such as foreclosure, incident to his legal title<sup>7</sup>.

In determining whether a person is a purchaser for value the common law rule that the court does not inquire into the adequacy of consideration is not applicable. The concept of 'purchaser for value' is based on equity which looks at substance not form<sup>8</sup>. However on the assignment of a lease the liability for the rent and the tenant's obligations, and the usual indemnity to the assignor, will suffice to render the assignee a purchaser for value<sup>9</sup>.

1 A conveyance by the legal owner, if made under a trust of land or under the powers of the Settled Land Act 1925, may operate to overreach equitable interests, and then there is no need for the purchaser to rely on the plea: see the Law of Property Act 1925 s 2(1), (2) (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARAS 248-249; SALE OF LAND vol 42 (Reissue) PARAS 271-272. See also *City of London Building Society v Flegg* [1988] AC 54, [1987] 3 All ER 435, HL.

2 See *Garrard v Frankel* (1862) 30 Beav 445; *Pilcher v Rawlins* (1872) 7 Ch App 259; *Westminster Bank Ltd v Lee* [1956] Ch 7 at 19-20, [1955] 2 All ER 883 at 887-888; *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, [1965] 2 All ER 472, HL; *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 3 All ER 747, [1995] 1 WLR 978; on appeal [1996] 1 All ER 585, [1996] 1 WLR 387, CA. As to the position of a person who has contracted to purchase the legal estate in unregistered land see PARA 577 post.

3 There was a tendency at first to restrict the plea to cases where it was used as a defence to equitable claims (see *Burlace v Cooke* (1677) Freem Ch 24; *Rogers v Seale* (1681) Freem Ch 84), but its validity against legal claims came to be firmly established (*Jerrard v Saunders* (1794) 2 Ves 454; *Wallwyn v Lee* (1803) 9 Ves 24; *Joyce v De Moleyns* (1845) 2 Jo & Lat 374; *A-G v Wilkins* (1853) 17 Beav 285).

4 The defendant's position was, of course, stronger if he himself had the legal estate or the best right to call for it (*Wilkes v Bodington* (1707) 2 Vern 599); and he could then maintain his priority for all purposes (see PARA 570 et seq post). Even without the legal estate, however, he could use the plea for the purposes stated in the text: see *Colyer v Finch* (1856) 5 HL Cas 905 at 920.

5 *Phillips v Phillips* (1862) 4 De GF & J 208.

6 This was ultimately held to be the effect of *Williams v Lambe* (1791) 3 Bro CC 264, where the plaintiff sued in equity for dower; and of *Collins v Archer* (1830) 1 Russ & M 284, where the plaintiff sued in equity for an account of tithes. Apparently these cases were decided on the ground that the plea was no defence to a legal claim, but in fact they were instances of claims made under the concurrent jurisdiction and were subsequently explained on this ground: *Phillips v Phillips* (1862) 4 De GF & J 208. So soon, indeed, as substantial relief is asked for in equity, the plea is bound to be rejected, for its acceptance would mean that a bona fide purchaser

for value could obtain a title from a vendor without title, an extension to equity of the former principle of sale in market overt for which there is no warrant: see Ashburner, *Principles of Equity* (2nd Edn, 1933) pp 50-51. It follows that the plea can be no more a defence to an equitable claim than to a legal claim under the concurrent jurisdiction. In each case substantial relief is asked for, and the plea is therefore overruled. This appears to have been first perceived by Lord Westbury LC in *Phillips v Phillips* supra, but his decision involved a breach with current notions and did not pass without protest: see Sugden, *Law of Vendors and Purchasers* (14th Edn, 1862) p 796.

7 *Finch v Shaw, Colyer v Finch* (1854) 19 Beav 500 at 509 per Romilly MR; affd sub nom *Colyer v Finch* (1856) 5 HL Cas 905.

8 *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 EGLR 119, [1998] All ER (D) 357.

9 *Blacklocks v JB Developments (Goldalming) Ltd* [1982] Ch 183, [1981] 3 All ER 392; *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 EGLR 119, [1998] All ER (D) 357 (which suggests that this may be so even without an express covenant or indemnity by the assignee in favour of the assignor).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(9) EQUITY FAVOURS A PURCHASER FOR VALUE WITHOUT NOTICE/566. Present availability of the plea.

### **566. Present availability of the plea.**

Now that all divisions of the High Court have jurisdiction both at law and in equity<sup>1</sup>, relief is granted in each division in respect of legal titles upon the same principles as formerly governed the granting of relief to a legal title under the concurrent jurisdiction in equity. Hence the plea of purchase for value without notice is no bar to disclosure in aid of a legal title<sup>2</sup>, and, as was the case before the fusion of the administration of law and equity<sup>3</sup>, it is no bar to disclosure in aid of an equitable title. The court in which the claim is brought gives the full appropriate relief to the legal or equitable title, and as incident to this relief it grants disclosure<sup>4</sup>. Moreover, since complete relief is to be given in the same court, it has become impracticable for the court to declare the claimant's title and at the same time leave him to recover the title deeds elsewhere. The court, in declaring his title to the land, must declare also his right to the title deeds, and must order them to be delivered to him accordingly<sup>5</sup>.

The plea of purchase for value without notice has, however, been shorn of much of its practical importance by the enactment of provisions for the registration of interests<sup>6</sup>.

1 See PARA 496 et seq ante.

2 *Ind, Coope & Co v Emmerson* (1887) 12 App Cas 300, HL. Disclosure was previously known as 'discovery' and is so referred to in the cases cited in the notes to this paragraph.

3 Before the Supreme Court of Judicature Act 1873 (repealed): see PARA 401 et seq ante.

4 *Ind, Coope & Co v Emmerson* (1887) 12 App Cas 300 at 306, HL, per Lord Selborne.

5 *Re Cooper, Cooper v Vesey* (1882) 20 ChD 611, CA; *Manners v Mew* (1885) 29 ChD 725 at 732-735; *Re Ingham, Jones v Ingham* [1893] 1 Ch 352 at 361.

6 See PARA 577 post. The plea still avails, however, against a mere equity: see PARA 567 post.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(9) EQUITY FAVOURS A PURCHASER FOR VALUE WITHOUT NOTICE/567. Plea still avails against a mere equity.

### 567. Plea still avails against a mere equity.

The plea of purchase for value without notice still avails against a claimant who is not seeking to establish a claim to an equitable estate or interest, but merely to enforce an equity, such as an equity to set aside a conveyance<sup>1</sup>. Ordinarily an assignee takes subject to all equities to which the assignor was subject. This is the case not only where the assignee is a volunteer but also where he is a purchaser for value if he has notice of the circumstances which raise the equity<sup>2</sup>. If, however, he is a purchaser for value without notice, the equity cannot be asserted against him<sup>3</sup>. Trustees in bankruptcy and judgment or execution creditors take only what was vested in the bankrupt or debtor; hence they do not rank as purchasers, but take subject to prior equities<sup>4</sup>. A vendor's lien is not a mere equity but an equitable interest, and it avails against the purchaser and persons claiming under him, whether as volunteers or for value, other than a subsequent purchaser who takes the legal estate without notice<sup>5</sup>; but the vendor may be postponed by his conduct<sup>6</sup>.

In relation to registered land, however, a mere equity has effect from the time the equity arises as an interest capable of binding successors in title, subject to the rules<sup>7</sup> about the effect of dispositions on priority<sup>8</sup>.

1 See PARA 604 post.

2 'A purchaser with notice is liable to the same equity, stands in the same place, and is bound to do that which the vendor would be bound to do by the decree': *Taylor v Stibbert* (1794) 2 Ves 437 at 439.

3 *Hamilton v Royse* (1804) 2 Sch & Lef 315 at 327; *Dunbar v Tredennick* (1813) 2 Ball & B 304 at 318-319; *Garrard v Frankel* (1862) 30 Beav 445; *Bainbrigge v Browne* (1881) 18 ChD 188; *Latec Investments Ltd v Hotel Terrigal Property Ltd* (1965) 113 CLR 265 at 278, HC of A, per Kitto J; and see *Blacklocks v JB Developments (Godalming) Ltd* [1982] Ch 183, [1981] 3 All ER 392 (right to rectify an overriding interest, not a 'mere equity', therefore binding on purchaser), applied in *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 EGLR 119, [1998] All ER (D) 357.

4 *Whitworth v Gaugain* (1846) 1 Ph 728; *Kinderley v Jervis* (1856) 22 Beav 1 at 27; *Beavan v Earl of Oxford* (1856) 6 De GM & G 507 at 517; *Madell v Thomas & Co* [1891] 1 QB 230 at 238, CA; and see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 394; CIVIL PROCEDURE vol 12 (2009) PARAS 1354-1355.

5 *Mackreth v Symmons* (1808) 15 Ves 329; *Rice v Rice* (1854) 2 Drew 73; *Kettlewell v Watson* (1884) 26 ChD 501, CA; and see *Frail v Ellis* (1852) 16 Beav 350.

6 *Rice v Rice* (1854) 2 Drew 73; and see PARA 569 post.

7 The rules referred to in the text are the rules contained in the Land Registration Act 2002 ss 28-31: see LAND REGISTRATION.

8 Ibid s 116. The Law Commission has expressed the view that this provision is declaratory only and does not effect a change in the law: see *Land Registration for the Twenty-First Century, a Conveyancing Revolution* (Law Com no 271) (2001) PARAS 5.30-5.31.

Such an equity is an interest which may override first registration where the person having the benefit of it is in actual occupation (Land Registration Act 2002 ss 11, 12, Sch 1 para 2) and may also, where the person having that benefit is in such occupation, override a registered disposition unless (1) inquiry was made of him before the disposition and he failed to disclose the right when he could reasonably have been expected to do so; or (2) his occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition and the person to whom the disposition is made does not have actual knowledge of the interest at that time (ss 29, 30, Sch 3 para 2). As to the meaning of 'actual occupation' see *Lloyd v Dugdale* [2001] EWCA

Civ 1754 at [43], [2002] 2 P & CR 167, [2001] All ER (D) 306 (Nov) (a decision under the Land Registration Act 1925 s 70(1)(g) (repealed)). See further LAND REGISTRATION.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(10) EQUITIES RANK IN ORDER OF TIME/568. He who is first in time has the stronger right.

## **(10) EQUITIES RANK IN ORDER OF TIME**

### **568. He who is first in time has the stronger right.**

Where the legal estate is outstanding, the priority of equitable interests is prima facie governed by the rule *qui prior est tempore, potior est jure* (he who is first in time has the stronger right)<sup>1</sup>. This is the primary rule because it is always applied in the absence of special circumstances and it establishes the burden of proof<sup>2</sup>.

The rule will be excluded if there is an act or omission by the prior equitable owner of such a character as to justify his title being postponed<sup>3</sup> and, in certain cases, if he fails to effect registration in respect of his interest<sup>4</sup>. The rule follows from the principle that equitable interests depend on the creation of a trust. The creation of a trust vests an interest in the subject matter of the trust in the beneficiary, and this interest cannot be postponed to a subsequent interest except upon grounds which justify the interference with it as a vested interest<sup>5</sup>. Against the enforcement of the prior equitable interest the plea of purchase for value without notice is, in the absence of the legal estate, no defence<sup>6</sup>. In the case of a chose in action or trust fund a subsequent equitable incumbrancer without notice can gain priority if he is the first to give notice to the debtor or trustee<sup>7</sup>. This doctrine did not formerly apply to land, and a subsequent incumbrancer did not gain priority by giving notice to the person in whom the legal estate was vested<sup>8</sup>. The doctrine now applies to equitable interests in land, and also to capital money representing land<sup>9</sup>.

1 See *Willoughby v Willoughby* (1756) 1 Term Rep 763 at 773 per Lord Hardwicke LC; *Brace v Duchess of Marlborough* (1728) 2 P Wms 491 at 496; *Phillips v Phillips* (1862) 4 De GF & J 208 at 215. In *Rice v Rice* (1854) 2 Drew 73, Kindersley V-C spoke of the rule as being the rule of last resort when there was no other ground for preferring one equity to the other; but in fact it is the prima facie rule, and is to be departed from only on sufficient grounds. The Law of Property Act 1925 s 113 (notice of trusts affecting mortgage debts: see MORTGAGE vol 77 (2010) PARA 373) does not oust the application of the rule to equitable interests in the mortgage debt: *Beddoes v Shaw*[1937] Ch 81, [1936] 2 All ER 1108. The rule was applied in *Assaf v Fuwa*[1955] AC 215, [1954] 3 WLR 552, PC, as regards property situated in Nigeria.

2 See *A-G v Biphosphated Guano Co*(1879) 11 ChD 327. The rule does not apply in the Admiralty practice: see *Bankers Trust International Ltd v Todd Shipyards Corpn, The Halcyon Isle*[1981] AC 221, [1980] 3 All ER 197, PC.

3 *Taylor v London and County Banking Co, London and County Banking Co v Nixon*[1901] 2 Ch 231 at 260, CA, per Stirling LJ.

4 The rule is liable to be varied where, under a provision for the registration of mortgages, priority is lost through failure to register: see the Law of Property Act 1925 s 97 (as amended); the Law of Property Act 1969 ss 16(3), 17(1)(b), Sch 2 Pt II; and LAND CHARGES. In the case of registered land, the basic rule is that the priority of any interest in registered land is determined by the date of creation: see the Land Registration Act 2002 s 28. This is expressly subject to the exceptions contained in ss 29, 30, which preserve the principal exception to the basic rule which existed under the previous law. If a registrable disposition of a registered charge is made for valuable consideration (as defined in s 132(1)), completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the charge immediately before the disposition whose priority is not protected at the time of registration: s 30(1). As to when the priority of an interest is protected for these purposes see s 30(2), (3). See further LAND REGISTRATION.

5 *Cory v Eyre* (1863) 1 De GJ & Sm 149 at 167 per Turner LJ; *Rice v Rice* (1854) 2 Drew 73; *Re King's Settlement*[1931] 2 Ch 294; *Abigail v Lapin*[1934] AC 491, PC. Cf *Capell v Winter*[1907] 2 Ch 376. Every



conveyance of an equitable interest is an innocent conveyance, that is to say the grant of a person entitled merely in equity passes only that to which he is justly entitled, and no more: *Phillips v Phillips* (1862) 4 De GF & J 208 at 215 per Lord Westbury LC; *Cave v Cave*(1880) 15 ChD 639 at 646. See also *Freeguard v Royal Bank of Scotland plc* (1998) 79 P & CR 81, CA (rights of option holder, who entered into transaction designed to give impression that legal estate was unencumbered, postponed in deference to rights of subsequent equitable mortgagee).

6 *Phillips v Phillips* (1862) 4 De GF & J 208; *Re Vernon, Ewens & Co*(1886) 33 ChD 402, CA; and see PARA 565 ante. Thus, where an appointment under an equitable power is a fraud on the power, a purchaser for value of the appointed interest, the legal estate being outstanding, cannot use the plea to make good his title: *Cloutte v Storey*[1911] 1 Ch 18, CA.

7 See PARA 643 post.

8 *Jones v Gibbons* (1804) 9 Ves 407; *Jones v Jones* (1838) 8 Sim 633; *Wilmot v Pike* (1845) 5 Hare 14; *Re Richards, Humber v Richards*(1890) 45 ChD 589; *Hopkins v Hemsworth*[1898] 2 Ch 347. This applies to equitable interests in leaseholds: *Wiltshire v Rabbits* (1844) 14 Sim 76; *Union Bank of London v Kent*(1888) 39 ChD 238, CA; and see *Taylor v London and County Banking Co, London and County Banking Co v Nixon*[1901] 2 Ch 231, CA.

9 See the Law of Property Act 1925 s 137(1); and CHOSER IN ACTION vol 13 (2009) PARA 45. The rule does not affect any priority acquired before 1 January 1926 (s 137(7)), nor does it apply until a trust has been created (s 137(10)).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(10) EQUITIES RANK IN ORDER OF TIME/569. Postponement of equitable claimant.

### 569. Postponement of equitable claimant.

In a contest between an equitable incumbrancer and a legal mortgagee, the legal mortgagee will not be postponed on the ground of his conduct unless he has been guilty either of direct fraud or of such gross negligence as would render it unjust to deprive the prior incumbrancer of his priority<sup>1</sup>. As between equitable claims the question is whether one party has acted in such a way as to justify him in insisting on his equity as against the other<sup>2</sup>; and it is possible that a lesser degree of negligence will suffice to postpone an equitable, as opposed to a legal, incumbrancer<sup>3</sup>. Whatever may be the abstract test, however, an equitable mortgagee who is entitled to the title deeds as part of his security, and who omits to obtain them, is postponed to a subsequent equitable mortgagee who takes the deeds without notice<sup>4</sup>; and this is also the case where the prior mortgagee, having obtained the deeds, parts with them or allows them unduly to remain out of his possession, and thereby enables the subsequent advance to be obtained<sup>5</sup>.

An equitable owner or incumbrancer whose interest is such that he does not require the possession of the title deeds to support it, as in the ordinary case of trustee and beneficiary where the deeds are with the trustee, cannot be charged with any negligence, however, if the trustee makes use of his possession of the deeds to commit a fraud, and is not postponed to a subsequent equitable owner who has parted with his money on the faith of the title deeds<sup>6</sup>, unless the trustee purports to act under a power vested in him, such as a trust or power of sale, and conveys the land by a deed containing a proper receipt clause<sup>7</sup>. If, however, the owner of property hands over the title deeds to an agent in order to enable him to dispose of the property, but subject to restrictions, and the agent creates an interest in disregard of the restrictions, then the owner, whether his estate is legal<sup>8</sup> or equitable, is bound by his agent's act and is postponed to the interest thus created<sup>9</sup>.

1 *Oliver v Hinton* [1899] 2 Ch 264 at 274, CA; *Northern Counties of England Fire Insurance Co v Whipp* (1884) 26 ChD 482, CA; *Manners v Mew* (1885) 29 ChD 725; *Hudston v Viney* [1921] 1 Ch 98; *Grierson v National Provincial Bank of England Ltd* [1913] 2 Ch 18. The omission to inquire for title deeds will postpone a legal mortgagee to a prior equitable estate, and will also postpone him to a subsequent equitable interest: *Walker v Linom* [1907] 2 Ch 104 at 114. In *Mocatta v Murgatroyd* (1717) 1 P Wms 393 a first mortgagee who attested the second mortgage was postponed for not giving to the second mortgagee notice of his mortgage, but it has been recognised that this went too far (see the reporter's note).

2 *National Provincial Bank of England v Jackson* (1886) 33 ChD 1 at 13, CA, per Cotton LJ.

3 In *Taylor v Russell* [1891] 1 Ch 8 at 17, CA, Kay J considered that the test was the same in each case, but this was doubted by Lord Macnaghten in *Taylor and Nugent v Russell and Mackay* [1892] AC 244 at 262, HL; and see *Taylor v London and County Banking Co, London and County Banking Co v Nixon* [1901] 2 Ch 231 at 260, CA; 2 Beven's Principles of the Law of Negligence (4th Edn, 1928) p 1554 et seq.

4 *Farrand v Yorkshire Banking Co* (1888) 40 ChD 182; *Re Castell and Brown Ltd, Roper v Castell and Brown Ltd* [1898] 1 Ch 315; *Re Valletort Sanitary Steam Laundry Co Ltd, Ward v Valletort Sanitary Steam Laundry Co Ltd* [1903] 2 Ch 654. As to the effect of possession of documents see the Law of Property Act 1925 s 13 (cited in para 577 note 4 post). Note that it is no longer possible to create an equitable mortgage over land by the mere deposit of title deeds: see MORTGAGE vol 77 (2010) PARAS 105, 118.

5 *Waldron v Sloper* (1852) 1 Drew 193.

6 *Cory v Eyre* (1863) 1 De GJ & Sm 149 at 169 per Turner LJ; *Shropshire Union Rlys and Canal Co v R* (1875) LR 7 HL 496 at 507 per Lord Cairns LC; *Carritt v Real and Personal Advance Co* (1889) 42 ChD 263; and see *Newton v Newton* (1868) 4 Ch App 143.

7 *Lloyds Bank Ltd v Bullock* [1896] 2 Ch 192. This does not apply where, the power being to sell only, the transaction is in effect one of mortgage: *Capell v Winter* [1907] 2 Ch 376. As to receipts for consideration moneys being a sufficient discharge see the Law of Property Act 1925 s 67; and SALE OF LAND vol 42 (Reissue) PARA 309.

8 *Perry Herrick v Attwood* (1857) 2 De G & J 21; *Brocklesby v Temperance Building Society* [1895] AC 173, HL.

9 *Rimmer v Webster* [1902] 2 Ch 163; *Abigail v Lapin* [1934] AC 491, PC. In *Rimmer v Webster* supra the result was alternatively based on estoppel: see *Truman v Attenborough* (1910) 103 LT 218; and AGENCY vol 1 (2008) PARAS 145-147.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(11) THE LEGAL ESTATE GIVES PRIORITY/570. The legal estate gives priority.

## **(11) THE LEGAL ESTATE GIVES PRIORITY**

### **570. The legal estate gives priority.**

When there is an existing equitable interest in property and an interest is subsequently created in favour of a purchaser for value without notice of the earlier interest<sup>1</sup>, and that purchaser either gets in the legal estate at the time of his purchase or, in certain circumstances, after his purchase<sup>2</sup>, his possession of the legal estate gives him priority<sup>3</sup> over the earlier equitable owner<sup>4</sup>. The equities being equal except as regards time, the legal estate, properly got in by the owner of the later equitable interest, entitles him to hold the property either as absolute owner or until his mortgage is discharged, as the case may be<sup>5</sup>. In the absence of notice or of any other circumstance to postpone him, other than that of being later in point of time, there is no equity attaching upon his conscience by virtue of which the court will deprive him of his legal advantage, and the subsequent purchaser is entitled to similar priority if he has the better right to call for a conveyance of the legal estate<sup>6</sup>. The importance which courts of equity, in deciding priorities, attach to the legal estate, is an instance of the general principle that equity follows the law<sup>7</sup>.

Under the Land Registration Act 1925<sup>8</sup> the doctrine of notice was replaced by provisions for overriding and minor interests in relation to registered land<sup>9</sup> and those provisions are substantially continued under the Land Registration Act 2002, although the term 'minor interest' is no longer employed<sup>10</sup>.

1 A purchaser who has notice of an equitable interest must not rely on the vendor's assurance that it has been got in, but must ascertain this for himself: *Jared v Clements*[1903] 1 Ch 428, CA. A contract which is merely personal and collateral does not create an equitable interest in the land so as to bind a purchaser taking with notice of it (*Phillips v Miller*(1875) LR 10 CP 420, Ex Ch); but a hire purchase agreement as to machinery to be affixed to the land was not such a contract, and a purchaser with notice, or who had only an equitable interest, took subject to it (*Re Samuel Allen & Sons Ltd*[1907] 1 Ch 575; *Re Morrison, Jones and Taylor Ltd, Cookes v Morrison, Jones and Taylor Ltd*[1914] 1 Ch 50, CA; *Hamer v London City and Midland Bank Ltd* (1918) 87 LJB 973). 'Purchaser for value' includes a mortgagee: *Berwick & Co v Price*[1905] 1 Ch 632.

2 An equitable mortgagee who obtains a legal interest does not thereby gain priority over an equitable interest of which he has constructive notice: *McCarthy and Stone Ltd v Julian S Hodge & Co Ltd*[1971] 2 All ER 973, [1971] 1 WLR 1547.

3 This is still the general principle as to the effect of the legal estate, although, owing to the changes in the law under which successive mortgagees may have legal estates, and the fact that registration of certain interests is actual notice (see the Law of Property Act 1925 s 198 (as amended); but cf the Law of Property Act 1969 s 24 (as amended); and PARA 577 post), there is less scope for its application than formerly: *Swiss Bank Corp v Lloyds Bank Ltd*[1979] Ch 548 at 566, [1979] 2 All ER 853 at 866 per Browne-Wilkinson J; varied [1982] AC 584, [1980] 2 All ER 19, CA; affd [1982] AC 584, [1981] 2 All ER 449, HL. As to the registration of charges see PARA 577 post; and LAND CHARGES; and as to registration of title in relation to land see LAND REGISTRATION.

4 *Marsh v Lee* (1670) 2 Vent 337. This is 'by reason of that force this court necessarily and rightly allows to the common law and to legal titles': *Wortley v Birkhead* (1754) 2 Ves Sen 571 at 574 per Lord Hardwicke LC. See also *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 WLR 150.

5 *Bates v Johnson* (1859) John 304 at 316; *Bailey v Barnes*[1894] 1 Ch 25 at 36, CA; and see *McCarthy and Stone Ltd v Julian S Hodge & Co Ltd*[1971] 2 All ER 973, [1971] 1 WLR 1547.

6 *Wilkes v Bodington* (1707) 2 Vern 599. This is so eg where the legal estate is held upon trust for the subsequent purchaser: *Stanhope v Earl Verney* (1761) 2 Eden 81; *Maundrell v Maundrell* (1805) 10 Ves 246 at

270; *Buckle v Mitchell* (1812) 18 Ves 100; *Wilmot v Pike* (1845) 5 Hare 14; *Taylor v London and County Banking Co, London and County Banking Co v Nixon* [1901] 2 Ch 231 at 263, CA. The legal estate is not available where it passes by estoppel only, and where the estoppel is not binding on the prior claimant: *Eyre v Burmester* (1862) 10 HL Cas 90; subsequent proceedings (1864) 4 De GJ & Sm 435.

7 See PARA 554 ante.

8 See LAND REGISTRATION.

9 The system under the Land Registration Act 1925 was said by Lord Wilberforce in *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487 at 503-504, [1980] 2 All ER 408 at 412, HL, to be 'designed to free the purchaser from the hazards of notice, real or constructive...The only kind of notice recognised is by entry on the register'. See also *Parkash v Irani Finance Ltd* [1970] Ch 101 at 109, [1969] 1 All ER 930 at 933 per Plowman J. Cf *Barclays Bank Ltd v Taylor* [1974] Ch 137, [1973] 1 All ER 752, CA; *Peffer v Rigg* [1978] 3 All ER 745, [1977] 1 WLR 285; *Lys v Prowsa Development Ltd* [1982] 2 All ER 953, [1982] 1 WLR 1044.

10 The Land Registration Act 2002 amends the law with regard to overriding interests in a number of respects. The term 'overriding interests' is not employed because such interests are now divided into two distinct lists; unregistered interests which override first registration, set out in ss 11(4)(b), 12(4)(c), Sch 1, and unregistered interests which override registered dispositions, set out in ss 29(2)(a)(ii), 30(2)(a)(ii), Sch 3. The substantive requirements with regard to the first three of the 14 categories listed in each Schedule differ according to whether the unregistered interest overrides first registration or a registered disposition: see Sch 1 paras 1-3, Sch 3 paras 1-3. Because of the changes made by the 2002 Act to the law of adverse possession, rights acquired or in the course of being acquired under the Limitation Act 1980 are excluded from the categories of unregistered interests capable of overriding either first registration or registered dispositions, but this is subject to transitional provisions: s 134(2), Sch 12 para 7. On first registration, however, the estate is vested subject to interests acquired under the Limitation Act 1980 of which the proprietor has notice: see ss 11(4)(c), 12(4)(d). With regard to the unregistered interests listed in both Sch 1 and Sch 3, provision is made for the abolition of five of the 14 categories listed at the end of the period of ten years beginning with 13 October 2003: s 117(1). In the interim such interests may be protected either by lodging a caution against first registration or by applying for the entry of a notice in the register in respect of any such interest: see s 117(2). Transitional provision is made with regard to former overriding interests: see Sch 12 paras 7-13. Applicants for first registration are now required to give details of any unregistered interests known to them which will override first registration: see s 71. See further LAND REGISTRATION.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(11) THE LEGAL ESTATE GIVES PRIORITY/571. Want of title in the vendor.

### **571. Want of title in the vendor.**

The legal estate affords protection to a purchaser not only where his title is impeached by reason of some secret act done by the vendor whereby he deprived himself of the right to dispose of the estate, but also where the vendor never had such right, but induced the purchaser by falsehood as to a fact of title to believe that he had the right; provided that the pretended title was clothed with possession and that the falsehood could not have been discovered by reasonable diligence<sup>1</sup>. The legal estate protects both against secret incumbrances on the vendor's title and against entire want of title in the vendor<sup>2</sup>.

1 *Jones v Powles* (1834) 3 My & K 581; *Young v Young* (1867) LR 3 Eq 801.

2 The plea of purchase for value without notice required an allegation of possession by the person who conveyed to the defendant, but not of his actual title; it was enough that he pretended to be entitled: Mitford, *Pleadings in Chancery* (5th Edn, 1847) pp 319-322 (where the essentials of the plea are given); Ashburner, *Principles of Equity* (2nd Edn, 1933) p 54; *Pilcher v Rawlins* (1872) 7 Ch App 259 at 266.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(11) THE LEGAL ESTATE GIVES PRIORITY/572. Purchaser with notice.

### **572. Purchaser with notice.**

A purchaser with notice can protect himself by getting in the legal estate from a purchaser who took without notice<sup>1</sup> unless the later purchaser is a trustee buying back trust property which he has sold, or there are other circumstances of fraud<sup>2</sup>.

1 *Lowther v Carlton* (1741) 2 Atk 242; *A-G v Biphosphated Guano Co* (1879) 11 ChD 327 at 334, CA; *Kettlewell v Watson* (1882) 21 ChD 685 at 707; *Re Handman and Wilcox's Contract* [1902] 1 Ch 599 at 609, CA; *Wilkes v Spooner* [1911] 2 KB 473, CA; *Gordon v Holland*, *Holland v Gordon* (1913) 108 LT 385, PC.

2 *Re Stapleford Colliery Co, Barrow's Case* (1880) 14 ChD 432 at 445, CA.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(11) THE LEGAL ESTATE GIVES PRIORITY/573. Legal estate got in at time of purchase.

### **573. Legal estate got in at time of purchase.**

If the later purchaser obtains a conveyance of the legal estate at the time of his purchase and can support the plea of purchase for valuable consideration without notice, the legal estate affords him an absolute protection<sup>1</sup>. He does not lose the protection because the person conveying to him is a trustee holding upon an express trust; and, if the deeds offered to, and properly accepted by, him do not give notice of the trust, he is not deemed to take with notice because he subsequently uses as a link in his title a deed which discloses the trust but which was unknown to him when he purchased<sup>2</sup>. The doctrine that the legal estate takes priority is also available for a trustee with the legal estate who makes an advance to the beneficiary without notice of a prior charge on the equitable interest; the legal estate gives him priority<sup>3</sup>.

1 *Pilcher v Rawlins* (1872) 7 Ch App 259 at 269.

2 *Pilcher v Rawlins* (1872) 7 Ch App 259, overruling *Carter v Carter* (1857) 3 K & J 617.

3 *Newman v Newman* (1885) 28 ChD 674.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(11) THE LEGAL ESTATE GIVES PRIORITY/574. Legal estate got in after purchase.

#### **574. Legal estate got in after purchase.**

Formerly, when a purchaser did not get in the legal estate at the time of his purchase, he might get it in subsequently from any person who was able to convey it to him without committing a breach of trust, and he thereby gained priority over any earlier equitable interest of which he had no notice at the time of his purchase<sup>1</sup>. It was immaterial that he had notice when he got in the legal estate<sup>2</sup>; indeed, his having then received notice was usually the reason for his desiring to get in that estate<sup>3</sup>. Even though proceedings had been commenced to establish the priorities, he might get in the estate at any time before an order for that purpose was made<sup>4</sup>. The doctrine, which was a form of tacking, was abolished by the Law of Property Act 1925<sup>5</sup>, although the right to tack still exists in certain circumstances<sup>6</sup>.

1 *Marsh v Lee* (1670) 2 Vent 337; *Brace v Duchess of Marlborough* (1728) 2 P Wms 491; *Bailey v Barnes* [1894] 1 Ch 25, CA.

2 *Blackwood v London Chartered Bank of Australia* (1874) LR 5 PC 92 at 111; and see PARA 572 the text to note 1 ante.

3 *Wortley v Birkhead* (1754) 2 Ves Sen 571 at 574; *Willoughby v Willoughby* (1756) 1 Term Rep 763.

4 *Brace v Duchess of Marlborough* (1728) 2 P Wms 491; *Wortley v Birkhead* (1754) 2 Ves Sen 571 at 574; *Bailey v Barnes* [1894] 1 Ch 25 at 37, CA.

5 See the Law of Property Act 1925 s 94(3); and MORTGAGE vol 77 (2010) PARA 264.

6 See *ibid* s 94(3) proviso; and MORTGAGE vol 77 (2010) PARAS 264-265.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(11) THE LEGAL ESTATE GIVES PRIORITY/575. Legal owner a trustee.

### 575. Legal owner a trustee.

Where there is a trust of the legal estate, a purchaser of a second or subsequent equitable interest who gets in the legal estate after notice of the trust cannot avail himself of the legal estate as against the prior equitable interest, even though he paid his money before receiving notice of the trust. By taking a conveyance with notice of the trust, he himself becomes the trustee, and must not, to secure a plank to save himself, be guilty of a breach of trust<sup>1</sup>; but a trust or equity, to affect the conscience<sup>2</sup> of the person who has got in the legal estate, must be a trust or equity not in favour of some third person but in favour of the person against whom the legal estate is set up<sup>3</sup>.

1 *Saunders v Dehew* (1692) 2 Vern 271; *Allen v Knight* (1846) 5 Hare 272; affd (1847) 16 LJ Ch 370; *Mumford v Stohwasser* (1874) LR 18 Eq 556 at 563; *Harpham v Shacklock* (1881) 19 ChD 207 at 214, CA; *Taylor v Russell* [1891] 1 Ch 8 at 29, CA; affd on appeal sub nom *Taylor and Nugent v Russell and Mackay* [1892] AC 244, HL; *Perham v Kempster* [1907] 1 Ch 373. According to the judgment of Wood V-C in *Carter v Carter* (1857) 3 K & J 617 at 639, and to a dictum of Jessel MR in *Mumford v Stohwasser* supra, the purchaser loses the protection if the trustee has notice but he himself has not, but there is nothing in such a case to affect the conscience of the purchaser, and he should not lose his legal advantage. This extension of the doctrine is referred to with doubt in *Bailey v Barnes* [1894] 1 Ch 25, CA. The purchaser will not lose the protection if he is entitled to assume that the trust is at an end or if, under the circumstances, he ought not to be affected by the trust: *Pearce v Bulteel* [1916] 2 Ch 544.

Originally a subsequent incumbrancer was allowed to protect himself by getting in a satisfied term (*Willoughby v Willoughby* (1756) 1 Term Rep 763), but later this could be done only where the term was unsatisfied (*Maundrell v Maundrell* (1805) 10 Ves 246 at 270; *Ex p Knott* (1806) 11 Ves 609 at 613; *Carter v Carter* supra at 639-640; *Prosser v Rice* (1859) 28 Beav 68 at 74; *Pilcher v Rawlins* (1872) 7 Ch App 259 at 268; *Mumford v Stohwasser* supra at 562; *Taylor v Russell* supra at 29, CA; affd [1892] AC 244, HL).

2 See PARA 404 note 1 ante.

3 *Taylor v Russell* [1891] 1 Ch 8 at 29, CA; affd on appeal sub nom *Taylor and Nugent v Russell and Mackay* [1892] AC 244, HL; and see MORTGAGE vol 77 (2010) PARA 282.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(12) NOTICE/576. Notice may be actual or constructive.

## **(12) NOTICE**

### **576. Notice may be actual or constructive.**

The doctrine of notice lies at the heart of equity. Given that there are two innocent parties, each enjoying rights, the earlier right prevails against the later right if the acquirer of the later right knows of the earlier right (actual notice) or would have discovered it had he taken proper steps (constructive notice)<sup>1</sup>. For actual notice to be binding it must be given by a person interested in the property and in the course of the negotiation<sup>2</sup>.

<sup>1</sup> *Barclays Bank plc v O'Brien*[1994] 1 AC 180 at 195, [1995] 4 All ER 417 at 429, HL, per Lord Browne-Wilkinson; applied in *TSB Bank plc v Camfield*[1995] 1 All ER 951, CA. As to the plea of purchase for value without notice see PARA 565 et seq ante.

<sup>2</sup> *Barnhart v Greenshields* (1853) 9 Moo PCC 18 at 36. Notice to a corporation must be given to an official as such: see *Simpson v Molson's Bank*[1895] AC 270, PC; and CHOSER IN ACTION vol 13 (2009) PARA 56.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(12) NOTICE/577. Statutory provisions as to notice.

### **577. Statutory provisions as to notice.**

The registration of any instrument or matter in any register kept under the Land Charges Act 1972<sup>1</sup> or any local land charges register<sup>2</sup> is deemed to constitute actual notice of such instrument or matter, and of the fact of such registration, to all persons and for all purposes connected with the land affected, as from the date of registration or other prescribed date<sup>3</sup> and so long as the registration continues in force<sup>4</sup>.

Where, however, under a contract for the sale or other disposition of any estate or interest in land the title to which is not registered<sup>5</sup> any question arises whether the purchaser<sup>6</sup> had knowledge, at the time of entering into the contract, of a registered land charge<sup>7</sup>, that question must be determined by reference to his actual knowledge<sup>8</sup>; and, for these purposes, any knowledge acquired in the course of a transaction by a person who is acting therein as counsel, or as solicitor or other agent, for another is treated as the knowledge of that other<sup>9</sup>.

Where any estate or interest with which such a contract is concerned is affected by a registered land charge and the purchaser, at the time of entering into the contract, had not received notice and did not otherwise actually know<sup>10</sup> that the estate or interest was affected by the charge, any provision of the contract is void so far as it purports to exclude the operation of the above provisions<sup>11</sup> or to exclude or restrict any right or remedy that might otherwise be exercisable by the purchaser on the ground that the estate or interest is affected by the charge<sup>12</sup>.

A purchaser is entitled to compensation in certain cases where a charge was registered against the name of an owner who was not a party to any transaction, or concerned in any event, comprised in the relevant title<sup>13</sup>.

If a charge on or obligation affecting land falls into one of the specified classes, it may be registered in the register of land charges as a land charge of that class<sup>14</sup>; and provision is made for the effect of non-registration<sup>15</sup>.

In the case of registered land, if a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected<sup>16</sup> at the time of registration<sup>17</sup>.

1 As to the registers see LAND CHARGES.

2 As to local land charges see LAND CHARGES.

3 As to priority notices see LAND CHARGES.

4 Law of Property Act 1925 s 198(1) (amended by the Local Land Charges Act 1975 s 17(2), Sch 1). The Law of Property Act 1925 s 198 (as amended) operates without prejudice to the provisions of that Act respecting the making of further advances by a mortgagee (see s 94 (as amended); and MORTGAGE vol 77 (2010) PARA 265), and applies only to instruments and matters required or authorised to be registered in any such register: s 198(2) (as so amended). Thus the Law of Property Act 1925 s 198 (as amended) does not apply to registered land: see LAND CHARGES. As to the registration of charges created by a company see COMPANIES vol 15 (2009) PARA 1295 et seq.

The Law of Property Act 1925 does not prejudicially affect the right or interest of any person arising out of or consequent upon the possession by him of any documents relating to a legal estate in land, nor affect any

question arising out of or consequent upon any omission to obtain, or any other absence of possession by any person of, any documents relating to a legal estate in land: s 13.

5     Ie under the Land Registration Acts 1925 or 2002: see LAND REGISTRATION.

6     For these purposes, 'purchaser' includes a lessee, mortgagee or other person acquiring or intending to acquire an estate or interest in land: Law of Property Act 1969 s 24(3).

7     For these purposes, 'registered land charge' means any instrument or matter registered, otherwise than in a register of local land charges, under the Land Charges Act 1972 or any Act replaced by it: Law of Property Act 1969 s 24(3); Land Charges Act 1972 s 18(6).

8     Ie without regard to the provisions of the Law of Property Act 1925 s 198 (as amended): see the text and notes 1-4 supra.

9     Law of Property Act 1969 s 24(1), (4) (s 24(1) amended by the Land Registration Act 2002 s 133, Sch 11 para 9) . See further PARA 578 post; and LAND CHARGES. The purpose of the Law of Property Act 1969 s 24 (now as amended) was to overrule the rule in *Re Forsey and Hollebone's Contract* [1927] 2 Ch 379 at 387, CA, per Eve J. See also *Rignall Developments Ltd v Halil* [1988] Ch 190, [1987] 3 All ER 170.

10    It seems that the notice must be actual and the Law of Property Act 1925 s 198(1) (as amended: see note 4 supra) does not apply.

11    Ie the provisions of the Law of Property Act 1969 s 24(1) (as amended): see the text and notes 5-9 supra.

12    Ibid s 24(2).

13    See ibid s 25(1); and LAND CHARGES.

14    Land Charges Act 1972 s 2(1). As to the classes of land charges so specified see s 2(2)-(8) (as amended); and LAND CHARGES.

15    See ibid s 4 (as amended); and LAND CHARGES.

16    As to when the priority of an interest is protected see the Land Registration Act 2002 s 29(2), (3); and LAND REGISTRATION.

17    Ibid s 29(1). Where the grant of a leasehold estate in land out of a registered estate does not involve a registrable disposition, s 29 has effect as if (1) the grant involved such a disposition; and (2) the disposition were registered at the time of the grant: s 29(4). See further LAND REGISTRATION.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(12) NOTICE/578. Notice to agent.

### 578. Notice to agent.

As a general rule notice to an agent employed in the transaction is imputed as actual knowledge to the principal, and affects him whether communicated to him or not<sup>1</sup>; but an exception is admitted where there has been fraud on the agent's part in the matter. Although actual communication to the principal is not required, fraud excludes in practice all probability of communication, and hence the knowledge of the fraudulent agent is not imputed to the principal<sup>2</sup>.

Notice to the agent will not, however, be imputed to the principal unless it is of a matter which was material to the particular transaction and which it was the agent's duty to communicate to his principal<sup>3</sup>; nor will it be imputed unless it comes to the knowledge of the agent as such in the same transaction with respect to which the question of notice to his principal arises<sup>4</sup>.

1 *Espin v Pemberton* (1859) 3 De G & J 547 at 554 per Lord Chelmsford LC, who pointed out that notice imputed in this way, although sometimes called 'constructive notice', is more conveniently classed as actual notice; *Royal Bank of Scotland plc v Etridge (No 2)* [1998] 4 All ER 705 at 718, [1998] 3 FCR 675 at 690-61, CA, per Stuart-Smith LJ (giving the judgment of the court) (decision revsd in part [2001] UKHL 44, [2002] 2 AC 773, [2001] 1 All ER 449); *Woolwich plc v Gomm* (1999) 79 P & CR 61, [1999] All ER (D) 877, CA. Cf *Cave v Cave* (1880) 15 ChD 639 at 643; *Berwick & Co v Price* [1905] 1 Ch 632 at 639. Notice to an agent is notice to the principal, since otherwise notice could always be avoided by employing agents: *Sheldon v Cox* (1764) 2 Eden 224; *Boursot v Savage* (1866) LR 2 Eq 134 at 142; *Rolland v Hart* (1871) 6 Ch App 678 at 681-682. The doctrine is not confined to notice to solicitors: *Merry v Abney* (1663) 1 Cas in Ch 38; and see PARA 577 ante (actual knowledge for the purpose of the Law of Property Act 1969 s 24 (as amended)). If the agent is acting within the scope of his authority, the most positive proof that he did not communicate notice to his principal does not exempt the principal: *Bawden v London, Edinburgh and Glasgow Assurance Co* [1892] 2 QB 534, CA. See also *Kingsnorth Trust Ltd v Tizard* [1986] 2 All ER 54; sub nom *Kingsnorth Finance Co Ltd v Tizard* [1986] 1 WLR 783; AGENCY vol 1 (2008) PARAS 137-138; and *Re David Payne & Co Ltd, Young v David Payne & Co Ltd* [1904] 2 Ch 608, CA.

2 *Kennedy v Green* (1834) 3 My & K 699 at 720; *Espin v Pemberton* (1859) 3 De G & J 547 at 555; *Thompson v Cartwright* (1863) 33 Beav 178 at 185; *Waldy v Gray* (1875) LR 20 Eq 238 at 251; and see *Re Lord Southampton's Estate, Allen v Lord Southampton, Banfather's Claim* (1880) 16 ChD 178; *Re Cousins* (1886) 31 ChD 671; cf *Marjoribanks v Hovenden* (1843) 6 l Eq R 238. There must be fraud independently of the mere non-disclosure of the prior title: *Atterbury v Wallis* (1856) 8 De GM & G 454 at 466. 'It must be made out that distinct fraud was intended in the very transaction, so as to make it necessary for the solicitor to conceal the facts from his client in order to defraud him': *Rolland v Hart* (1871) 6 Ch App 678 at 682-683; and see *Cave v Cave* (1880) 15 ChD 639 at 644; *Berwick & Co v Price* [1905] 1 Ch 632 at 640.

3 Thus it is not material to a transaction of transfer of mortgage that the transferee's solicitor knows of a matter which would, if known to the transferee, prevent a further advance: *Wyllie v Pollen* (1863) 3 De GJ & Sm 596 at 601; and see *Espin v Pemberton* (1859) 3 De G & J 547 at 554; *Rolland v Hart* (1871) 6 Ch App 678 at 682. See also AGENCY vol 1 (2008) PARAS 137-138.

4 See PARA 583 post.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(12) NOTICE/579. Knowledge of common officer of two companies.

### **579. Knowledge of common officer of two companies.**

Where a transaction takes place between two companies which have a common officer who is concerned in the transaction, knowledge acquired by him as officer of one company will not be imputed to the other company unless it was his duty, as officer of the first company, to communicate that knowledge to the other company, and his duty, as officer of the second company, to receive notice<sup>1</sup>. As regards matters of internal regulation, the second company is entitled to assume that the first company has acted regularly<sup>2</sup>.

<sup>1</sup> *Re Hampshire Land Co* [1896] 2 Ch 743; *Re Fenwick, Stobart & Co Ltd, Deep Sea Fishery Co Ltd's Claim* [1902] 1 Ch 507; and see COMPANIES vol 14 (2009) PARA 127.

<sup>2</sup> *Royal British Bank v Turquand* (1856) 6 E & B 327, Ex Ch; *Re Hampshire Land Co* (1896) 2 Ch 743; and see COMPANIES.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(12) NOTICE/580. Application of the doctrine of constructive notice.

### **580. Application of the doctrine of constructive notice.**

The equitable doctrine of constructive notice whereby a person without actual notice of some matter is in certain circumstances treated as if he had notice of it is commonly applied in dealing with estates in land, but will not as a general rule be extended to commercial transactions<sup>1</sup>; and the tendency is to restrict the application of the doctrine<sup>2</sup>. Thus it does not apply where negotiable securities are taken in the ordinary course of business and without ground of suspicion, merely because inquiry would have led to knowledge of a defect of title<sup>3</sup>. Notice that debentures have been issued is not necessarily notice of their contents<sup>4</sup>. The doctrine does, however, apply to a mortgage of an insurance policy<sup>5</sup>, or where a trustee pays part of the trust fund to an assignee of the beneficiary<sup>6</sup>. Where the effect of constructive notice would be to invalidate a transaction, such as a sale under the Settled Land Act 1925, the court will not readily apply the doctrine<sup>7</sup>.

1 *Joseph v Lyons* (1884) 15 QBD 280, CA; *Manchester Trust v Furness* [1895] 2 QB 539 at 545, CA; *Lloyds Bank Ltd v Swiss Bankverein, Union of London and Smith's Bank Ltd v Swiss Bankverein* (1913) 108 LT 143 at 145, CA; *Greer v Downs Supply Co* [1927] 2 KB 28 at 36, CA.

2 See *The Birnam Wood* [1907] P 1 at 14, CA per Farwell LJ ('the courts have of late years been unwilling to apply the principle of constructive notice so as to fix companies or persons with knowledge of facts of which they had no knowledge whatever'); *Re Montagu's Settlement Trusts, Duke of Manchester v National Westminster Bank Ltd* [1987] Ch 264, [1987] 2 WLR 1192.

3 *London Joint Stock Bank v Simmons* [1892] AC 201, HL; *Thomson v Clydesdale Bank Ltd* [1893] AC 282, HL; *Fuller v Glyn, Mills, Currie & Co* [1914] 2 KB 168.

4 *English and Scottish Mercantile Investment Co v Brunton* [1892] 2 QB 700, CA; *Re Valletort Sanitary Steam Laundry Co Ltd, Ward v Valletort Sanitary Steam Laundry Co Ltd* [1903] 2 Ch 654; and see *Wilson v Kelland* [1910] 2 Ch 306.

5 *Spencer v Clarke* (1878) 9 ChD 137; *Re Weniger's Policy* [1910] 2 Ch 291.

6 *Davis v Hutchings* [1907] 1 Ch 356; and see TRUSTS vol 48 (2007 Reissue) PARA 742.

7 *Mogridge v Clapp* [1892] 3 Ch 382 at 396, CA; and see *Hurrell v Littlejohn* [1904] 1 Ch 689.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(12) NOTICE/581. Constructive notice in relation to dealings with land.

### **581. Constructive notice in relation to dealings with land.**

A purchaser of land without actual knowledge, by himself or his agent, of a matter prejudicially affecting his vendor's title may yet be regarded as having constructive notice of it.

Constructive notice has been defined as the knowledge which the courts impute to a person upon a presumption of the existence of the knowledge so strong that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him upon further inquiry or from his wilfully abstaining from inquiry to avoid notice<sup>1</sup>.

The doctrine of constructive notice is inapplicable, as a rule, to systems of registration in relation to transactions where priority and notice are governed by priority in, or the fact of, registration; thus a subsequent purchaser or incumbrancer who gains priority by registering first does not lose priority by actual or constructive notice, but only by fraud<sup>2</sup>.

1 *Espin v Pemberton* (1859) 3 De G & J 547 at 554 per Lord Chelmsford LC. It was frequently said that the doctrine of constructive notice was not to be extended: see *Ware v Lord Egmont* (1854) 4 De GM & G 460. Where notice was relied on to prevent priority by registration under the Deeds Registration Acts, this had to be not merely constructive, but such direct notice as to make it fraudulent in the purchaser to disregard it: *Le Neve v Le Neve* (1747) Amb 436; 2 White & Tud LC (9th Edn) 157; *Jolland v Stainbridge* (1797) 3 Ves 478; *Wyatt v Barwell* (1815) 19 Ves 435; *Robinson v Woodward* (1851) 4 De G & Sm 562; *Bradley v Riches* (1878) 9 ChD 189; and see *Crowly v Bergtheil* [1899] AC 374, PC; *Kingsnorth Trust Ltd v Tizard* [1986] 2 All ER 54; sub nom *Kingsnorth Finance Co Ltd v Tizard* [1986] 1 WLR 783.

2 *Battison v Hobson* [1896] 2 Ch 403; *Whiteley v Delaney* [1914] AC 132 at 147, HL (both decided under the Yorkshire Registries Act 1884 s 14 (now obsolescent: see the Law of Property Act 1969 s 16(2), Sch 2 Pt I)); cf *Robinson v Woodward* (1851) 4 De G & Sm 562. For examples of priority given by registration see also *Black v Williams* [1895] 1 Ch 408 (decided under the Merchant Shipping Act 1894 (repealed): see SHIPPING AND MARITIME LAW vol 93 (2008) PARA 321); *Re Monolithic Building Co, Tacon v Monolithic Building Co* [1915] 1 Ch 643, CA (decided under the Companies (Consolidation) Act 1908 s 93 (repealed): see now the Companies Act 1985 ss 395-398 (as amended) to be replaced from a date to be appointed by the Companies Act 1989 ss 92-95; and COMPANIES vol 15 (2009) PARA 1296 et seq). The rule that registration gives priority appears to be applicable to registration under the Land Charges Act 1972; this view derives support from the meaning of 'purchaser' in that Act (see LAND CHARGES vol 26 (2004 Reissue) PARA 616) and has the consequence that the doctrine of *Le Neve v Le Neve* (1747) Amb 436 would not be recognised for the purpose of that Act. See also *Midland Bank Trust Co Ltd v Green* [1981] AC 513, [1981] 1 All ER 153, HL.

An interest not created by a document which is registrable does not lose priority by the mere registration of a subsequent registrable incumbrance: see *Re Calcott and Elvin's Contract* [1898] 2 Ch 460, CA (decided under the Middlesex Registry Act 1708 (repealed)); and see *White v Neaylon* (1886) 11 App Cas 171, PC. Registration of an assignment under the Patents Act 1949 s 74 (repealed) was subject to equities of which the assignee had notice (*New Ixion Tyre and Cycle Co v Spilsbury* [1898] 2 Ch 484, CA); but see now the Patents Act 1977 s 30, s 32 (as substituted and amended); and PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARA 585 et seq.

### **UPDATE**

### **581 Constructive notice in relation to dealings with land**

NOTE 2--1969 Act s 16 repealed: Statute Law (Repeals) Act 2004.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(12) NOTICE/582. Constructive notice where the title is not investigated.

## 582. Constructive notice where the title is not investigated.

A purchaser is bound, at the risk of being affected with constructive notice, to make the usual full investigation of title notwithstanding that he is debarred by agreement from doing so<sup>1</sup>, and he is bound to follow up any inquiries suggested by matters of which he has actual notice<sup>2</sup>; so that notice of a deed which affects the land, being a deed within the period for which the title should be investigated, is notice both of its contents and of the facts which would be disclosed if its production were insisted upon<sup>3</sup>. Notice that the land is in the possession of a tenant puts the purchaser on inquiry as to the terms of the holding, and he has constructive notice of the tenant's rights<sup>4</sup> including an agreement for sale to him<sup>5</sup>.

This refers, however, only to equities between the purchaser and tenant when the legal estate has passed, and does not enable a vendor to obtain specific performance of the contract of sale on the ground that the purchaser must be taken to have had knowledge of the terms of a tenant's tenancy and thus to have accepted the position which they created<sup>6</sup>. A purchaser must inquire for the title deeds and call for their production<sup>7</sup>, but he may accept a satisfactory reason for their non-production and is not then affected with notice of the title of a third person who in fact holds them<sup>8</sup>.

1 *Peto v Hammond* (1861) 30 Beav 495 at 507; *Re Cox and Neve's Contract* [1891] 2 Ch 109 at 117.

2 'In all cases where the purchaser cannot make out a title but by a deed which leads him to another fact, the purchaser shall not be a purchaser without notice of that fact, but shall be presumed cognisant thereof; for it is crassa negligentia that he sought not after it': *Moore v Bennett* (1678) 2 Cas in Ch 246; and see *Bisco v Earl of Banbury* (1676) 1 Cas in Ch 287 at 291; *Coppin v Fernyhough* (1788) 2 Bro CC 291; *Malpas v Ackland* (1827) 3 Russ 273.

3 See *Peto v Hammond* (1861) 30 Beav 495. Where, however, a deed may or may not affect the land, and the purchaser inquires whether it does and receives an answer in the negative, he is not bound to inquire further: *Jones v Smith* (1841) 1 Hare 43; affd (1843) 1 Ph 244; and see *English and Scottish Mercantile Investment Co Ltd v Brunton* [1892] 2 QB 700, CA. The rule applies in general only to documents which form part of the claim of title: *Parker v Judkin* [1931] 1 Ch 475, CA. A recital that a legal owner holds in trust for X under a will or deed affects a purchaser with notice of the contents of the will or deed; but a recital that he holds in trust for X is a mere admission against interest, and does not put the purchaser on inquiry as to the origin of the trust: *Re Chafer and Randall's Contract* [1916] 2 Ch 8, CA.

4 *Taylor v Stibbert* (1794) 2 Ves 437; *Allen v Anthony* (1816) 1 Mer 282; *Meux v Maltby* (1818) 2 Swan 277 at 281; *Barnhart v Greenshields* (1853) 9 Moo PCC 18. The constructive notice thus given does not, however, extend to notice of an equity for rectification of a written tenancy agreement: *Smith v Jones* [1954] 2 All ER 823, [1954] 1 WLR 1089. The purchaser is not affected with notice of the title of a person, other than the vendor, under whom the tenant claims. A person neglecting to inquire to whom the tenant pays rent is not affected with notice of the interest of the tenant's landlord, although, if he has actual notice that an adverse claimant is in receipt of rent, he is affected with notice of any interest that claimant may have: *Barnhart v Greenshields* supra at 34; *Knight v Bowyer* (1858) 2 De G & J 421; *Hunt v Luck* [1902] 1 Ch 428, CA (*Mumford v Stohwasser* (1874) LR 18 Eq 556 overruled on this point). As to constructive notice as between vendor and purchaser or landlord and tenant see also *Poster v Slough Estates Ltd* [1969] 1 Ch 495 at 506, [1968] 3 All ER 257 at 261.

5 *Daniels v Davison* (1809) 16 Ves 249 at 254; subsequent proceedings (1811) 17 Ves 433; *Hunt v Luck* [1902] 1 Ch 428, CA.

6 *Caballero v Henty* (1874) 9 Ch App 447 (brewer contracted to buy public house; tenant in occupation; lease was to another brewer and eight years were unexpired; specific performance refused); and see *Phillips v Miller* (1875) LR 10 CP 420, Ex Ch.

7 *Birch v Ellames and Gorst* (1794) 2 Anst 427; *Worthington v Morgan* (1849) 16 Sim 547; *Oliver v Hinton* [1899] 2 Ch 264, CA; *Berwick & Co v Price* [1905] 1 Ch 632 at 638; *Re Greer*, *Greer v Greer* [1907] 1 IR 57.

8 *Plumb v Fluit* (1791) 2 Anst 432; *Hewitt v Loosemore* (1851) 9 Hare 449 at 457; *Espin v Pemberton* (1859) 3 De G & J 547 at 556; *Spencer v Clarke* (1878) 9 ChD 137. The statement that the title deeds are at a banker's for safe custody is not sufficient: *Maxfield v Burton* (1873) LR 17 Eq 15. Actual notice that the deeds are in the custody of a third person is notice of that person's interest: *Hiern v Mill* (1806) 13 Ves 114; *Dryden v Frost* (1838) 3 My & Cr 670 at 673; and see *Oliver v Hinton* [1899] 2 Ch 264, CA; *Walker v Linom* [1907] 2 Ch 104 at 114.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/2. PRINCIPLES OF EQUITABLE JURISDICTION/(12) NOTICE/583-600. Statutory restrictions on constructive notice.

## **583-600. Statutory restrictions on constructive notice.**

A purchaser<sup>1</sup> is not prejudicially affected by notice of:

- 61 (1) any instrument or matter<sup>2</sup> capable of registration under the provisions of the Land Charges Act 1972<sup>3</sup>, or any enactment which it replaced, which is void or not enforceable<sup>4</sup> as against him<sup>5</sup> under that Act or enactment, by reason of the non-registration thereof<sup>6</sup>;
- 62 (2) any other instrument or matter or any fact or thing unless:
  - 1 (a) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made<sup>7</sup> as ought reasonably to have been made by him<sup>8</sup>; or
  - 2 (b) in the same transaction<sup>9</sup> with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor<sup>10</sup> or other agent, as such, or would have come to the knowledge of his solicitor or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent<sup>11</sup>. Accordingly a purchaser is not affected by notice of anything which his solicitor has discovered unless he was acting as his solicitor at the time when he, the solicitor, discovered it<sup>12</sup>.

A purchaser is not, by reason of anything in the above provisions<sup>13</sup>, affected by notice in any case where he would not have been so affected if those provisions had not been enacted<sup>14</sup>.

Where<sup>15</sup> an intending lessee or assign is not entitled to call for the title to the freehold or to a leasehold reversion, as the case may be, he is not deemed to be affected with notice of any matter or thing of which, if he had contracted that such title should be furnished, he might have had notice<sup>16</sup>.

1 For these purposes, 'purchaser' means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property; and 'valuable consideration' includes marriage but does not include a nominal consideration in money: see the Law of Property Act 1925 s 205(1)(xxi). See also *Hunt v Luck* [1902] 1 Ch 428 at 433, CA; cf *Wilson v Hart* (1886) 1 Ch App 463 at 467.

2 For an example of such a matter see *Re Middleton and Young's Contract* [1929] WN 70 (street works charge registered as local land charge).

3 As to what may be registered under the Land Charges Act 1972 see LAND CHARGES.

4 See PARA 577 ante; and LAND CHARGES.

5 As to the different meanings attributed to 'purchaser' in the Law of Property Act 1925 and the Land Charges Act 1972 s 17(1) (as amended) see *Midland Bank Trust Co Ltd v Green* [1981] AC 513, [1981] 1 All ER 153, HL; note 1 supra; and LAND CHARGES vol 26 (2004 Reissue) PARA 616.

6 Law of Property Act 1925 s 199(1)(i); Land Charges Act 1972 s 18(6). Thus if eg an estate contract is not registered as a land charge, a mortgagee will not be affected prejudicially by having constructive notice of it:

*Coventry Permanent Economic Building Society v Jones* [1951] 1 All ER 901. As regards the extension to registration under other Acts see PARA 577 note 4 ante.

7 As to the inquiries and inspections which ought to be made on a purchase of land see SALE OF LAND vol 42 (Reissue) PARA 4 et seq. In general a purchaser of a legal estate in land is presumed to have examined every title deed which is a link in the chain of title (*West v Reid* (1843) 2 Hare 249), but it seems that the inspections to which reference is made in this context are inspections of documents, not of the land purchased (*Slack v Hancock* (1912) 107 LT 14).

The question is one of prudence, having regard to what is done by businessmen in similar circumstances: see *Bailey v Barnes* [1894] 1 Ch 25 at 35, CA. The test in *Bailey v Barnes* supra was said to represent the modern approach in *Woolwich plc v Gomm* (1999) 79 P & CR 61, [1999] All ER (D) 877, CA, though it was no longer appropriate to equate the test with that of gross negligence. There is no duty to make inquiries, in the sense of a duty owed to the holder of a latent title or security, but the word 'duty' may be used to describe the course which a person dealing properly for his own interest ought to follow: see *Agra Bank Ltd v Barry* (1874) LR 7 HL 135 at 157 per Lord Selborne. A tenant, for example, when negotiating for a house should inquire the terms of a restrictive covenant if the existence of some such covenant is known: see *Holloway Bros Ltd v Hill* [1902] 2 Ch 612 at 620 per Byrne J. It seems that, where a document, apparently regular, is produced in answer to inquiry, there is no duty to inquire further whether it correctly represents the parties' rights: see *Smith v Jones* [1954] 2 All ER 823 at 828, [1954] 1 WLR 1089 at 1092. Each case depends on its own facts; and great caution must be observed in applying the doctrine of constructive notice to the rights of a deserted wife in occupation of the matrimonial home (see *Westminster Bank Ltd v Lee* [1956] Ch 7 at 21, [1955] 2 All ER 883 at 889). The rights of occupation of a spouse are now registrable as a Class F land charge: see the Land Charges Act 1972 s 2(7) (as amended); and LAND CHARGES.

8 Law of Property Act 1925 s 199(1)(ii)(a). Section 199(1)(ii) does not, however, exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and any such liability or obligation may be enforced in the same manner and to the same extent as if s 199(1)(ii) had not been enacted (s 199(2)), but it does not affect him with constructive notice of matters which he would not have ascertained without going behind the documents of title (*Earl of Gainsborough v Watcombe Terracotta Clay Co Ltd* (1885) 54 LJ Ch 991). Constructive notice was not imputed to a bank which took a legal charge on the mortgagor's house in good faith and without actual notice of his wife's equitable interest in it: *Caunce v Caunce* [1969] 1 All ER 722, [1969] 1 WLR 286; disapproved in *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487, [1980] 2 All ER 408, HL; not followed in *Kingsnorth Trust Ltd v Tizard* [1986] 2 All ER 54; sub nom *Kingsnorth Finance Co Ltd v Tizard* [1986] 1 WLR 783; and see *Hodgson v Marks* [1971] Ch 892, [1971] 2 All ER 684, CA. See also *Abbey National v Tufts* [1999] 2 FLR 399, [1999] Fam Law 542, CA (inquiry by bank as to wife's employment to decide whether to give advance on basis of her credit status not addressed by the Law of Property Act 1925 s 199(1)(ii)(a); no constructive notice of fraud). As to the right of a husband or wife to occupy a dwelling house which has been the matrimonial home see now the Family Law Act 1996; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 285 et seq.

9 See eg *Taylor v London and County Banking Co, London and County Banking Co v Nixon* [1901] 2 Ch 231 (appropriation not come to solicitor's knowledge in same transaction); *Re Cousins* (1886) 31 ChD 671 (notice not come to knowledge of solicitor as such in same mortgage transaction); and see PARA 578 note 3 ante. The limitation to knowledge arising in the same transaction restores the rule laid down by Lord Hardwicke LC in *Warwick v Warwick* (1745) 3 Atk 291 for the reason that 'otherwise it would make purchasers' and mortgagees' titles depend altogether on the memory of their counsellors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions': see *Worsley v Earl of Scarborough* (1746) 3 Atk 392.

10 See *Meyer v Charters* (1918) 34 TLR 589 (solicitor acting for mortgagor and mortgagee). The mere fact that only one solicitor is employed in a matter does not make him the agent of both parties (*Perry v Holl* (1860) 2 De GF & J 38); but, where a client has placed himself entirely in the hands of his solicitor, and constituted him his general agent in a series of transactions, the solicitor's knowledge is imputed to him (*Dixon v Winch* [1900] 1 Ch 736, CA).

11 Law of Property Act 1925 s 199(1)(ii)(b); and see *Thorne v Heard and Marsh* [1895] AC 495 at 501, HL. The same test should be applied under s 199(1)(ii)(b) as that under s 199(1)(ii)(a) (see note 7 supra): *Woolwich plc v Gomm* (1999) 79 P & CR 61, [1999] All ER (D) 877, CA. The test is an objective one and could not depend upon the particular instructions given to the particular solicitors. See also note 8 supra.

12 *Halifax Mortgage Services Ltd (formerly BNP Mortgages Ltd) v Stepsky* [1996] Ch 207, [1996] 2 All ER 277, CA; *Royal Bank of Scotland plc v Etridge (No 2)* [1998] 4 All ER 705, [1998] 3 FCR 675, CA (decision revsd in part [2001] UKHL 44, [2002] 2 AC 773, [2001] 1 All ER 449).

13 In the Law of Property Act 1925 s 199(1), (2): see the text and notes 1-11 supra. Section 199(1), (2) does not, however, extend the scope of constructive notice as established by decisions before the legislation was enacted, which accordingly may still be used as a shield: *Hunt v Luck* [1902] 1 Ch 428 at 435, CA; applied in

*Kemmis v Kemmis (Welland intervening), Lazard Bros & Co (Jersey) Ltd v Norah Holdings Ltd* [1988] 1 WLR 1307, CA.

14 Law of Property Act 1925 s 199(3).

15 le by reason of *ibid* s 44(2)-(4) (as amended): see SALE OF LAND vol 42 (Reissue) PARA 140. Section 44(2)-(5) (as amended) does not apply to a contract to grant a term of years if the grant will be an event within the Land Registration Act 2002 s 4(1) (events which trigger compulsory first registration of title: see LAND REGISTRATION): Law of Property Act 1925 s 44(4A) (added by the Land Registration Act 2002 s 133, Sch 11 para 2(1),(2)).

16 Law of Property Act 1925 s 44(5) (amended by the Land Registration Act 2002 Sch 11 para 2(1), (3)); and see note 15 *supra*. A lessee who had actual notice is not, however, protected by the Law of Property Act 1925 s 44(5) (as so amended); nor is a lessee protected from the statutory provisions relating to actual notice (see PARA 577 *ante*) given by registration under the Land Charges Act 1972; nor does the Law of Property Act 1925 s 44(5) (as so amended) protect a lessee of registered land subject to a covenant appearing on the register of the freehold title: *White v Bijou Mansions Ltd* [1937] Ch 610, [1937] 3 All ER 269; *affd* [1938] Ch 351, [1938] 1 All ER 546, CA.

## **UPDATE**

### **583-600 Statutory restrictions on constructive notice**

NOTE 1--1925 Act s 205(1)(xxi) amended: Civil Partnership Act 2004 Sch 27 para 7.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(1) NATURE OF EQUITABLE INTERESTS/(i) Equitable Interests in Land/601. Legal and equitable estates; effect given to equitable interests.

### **3. EQUITABLE INTERESTS IN PROPERTY**

#### **(1) NATURE OF EQUITABLE INTERESTS**

##### **(i) Equitable Interests in Land**

#### **601. Legal and equitable estates; effect given to equitable interests.**

Interests in land validly created or arising after 31 December 1925 which are not capable of subsisting as legal estates<sup>1</sup> take effect as equitable interests and, save as otherwise expressly provided by statute<sup>2</sup>, interests in land which under the Statute of Uses<sup>3</sup> or otherwise could before 1 January 1926 have been created as legal interests are capable of being created as equitable interests<sup>4</sup>. Thus, while legal estates are now restricted to a fee simple absolute in possession and a term of years absolute, there can be the same variety of equitable interests as formerly, but undivided shares in land can exist only behind a trust of land<sup>5</sup>.

The owner of the legal estate is bound to give effect to the equitable interests affecting it, and the mode in which this is to be done in the case of settled land<sup>6</sup> differs from that which applies to land held on a trust of land<sup>7</sup>. Where the legal estate affected is settled land, the tenant for life or statutory owner must give effect to the equitable interests and powers as provided by the Settled Land Act 1925<sup>8</sup>. In any other case the estate owner is bound to give effect to the equitable interests and powers affecting his estate of which he has notice according to their respective priorities; but this does not affect the priority or powers of a legal mortgagee or the powers of personal representatives for purposes of administration<sup>9</sup>.

<sup>1</sup> I.e. by virtue of the Law of Property Act 1925 s 1(1), (2) (as amended): see REAL PROPERTY vol 39(2) (Reissue) PARAS 45-46.

<sup>2</sup> Thus a lease for lives cannot now be created: see *ibid* s 149(6); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 240.

<sup>3</sup> I.e. under the Statute of Uses (1535) (repealed).

<sup>4</sup> Law of Property Act 1925 s 4(1). As to the nature of equitable interests see Maitland, *Equity* (2nd Edn) 106 et seq.

<sup>5</sup> See the Law of Property Act 1925 s 34(1); the Settled Land Act 1925 s 36(4) (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 46.

<sup>6</sup> With very limited exceptions it has not been possible to create a settlement for the purposes of the Settled Land Act 1925 since the coming into force of the Trusts of Land and Appointment of Trustees Act 1996 on 1 January 1997: see s 2.

<sup>7</sup> See the Law of Property Act 1925 s 3(1)-(6) (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 184 et seq.

<sup>8</sup> *Ibid* s 3(1)(a).

<sup>9</sup> *Ibid* s 3(1)(c) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 4(3)).





Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(1) NATURE OF EQUITABLE INTERESTS/(i) Equitable Interests in Land/602. Equitable interests in land under trusts.

## **602. Equitable interests in land under trusts.**

An equitable interest arises under a trust when, by virtue of a deed, will or other instrument, the legal owner (the trustee) is bound to hold the property for the benefit of another (the cestui que trust or beneficiary)<sup>1</sup>; or when, without a written instrument, the circumstances are such that a court of equity will impose this obligation upon the legal owner<sup>2</sup>. The essence of the relation of trustee and beneficiary is that the trustee is at law the owner of the land, even when the beneficiary takes the profits, and the beneficiary can require the trustee to convey at his direction<sup>3</sup>.

Originally the beneficiary was not considered to have any right in the land itself<sup>4</sup>. Later the right of the beneficiary, since it extended to the beneficial enjoyment of the land itself, came to be regarded as giving him an interest in the land, and this equitable interest now ranks as a right attaching to the land<sup>5</sup>, although the right may be defeated if the legal estate passes to an owner who takes for value without notice<sup>6</sup>.

1 See *Hardoon v Belilios* [1901] AC 118 at 123, PC. As to the term 'cestui que trust' (ie beneficiary) see 26 LQR 196; and as to the need for a written instrument see the Law of Property Act 1925 s 53; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 24, 147-148.

2 As to the various classes of trusts, express, constructive and resulting, see PARAS 851-853 post; and TRUSTS vol 48 (2007 Reissue) PARA 624 et seq.

3 See Co Litt 290b, Butler's note adapting to trusts the definition of a use in *Chudleigh's Case* (1594) 1 Co Rep 113b at 120a, 121b; and see at 121b, note (N). A beneficiary holding merely an equitable interest under a trust may likewise become a trustee of that equitable interest under a sub-trust.

4 His right was merely a personal right to enforce the trust against the trustee and such subsequent legal owners as, in the view of a court of equity, ought to be required to give effect to the trust. Such subsequent owners included persons deriving title under the trustee without consideration, whether with or without notice of the trust, and persons taking from the trustee for valuable consideration with notice of the trust. At common law the trust was a chose in action, to be enforced only by subpoena in Chancery, and hence it was not assignable at common law: *Finch's (Sir Moyle) Case* (1600) 4 Co Inst 85.

5 *Re Nisbet and Potts' Contract* [1906] 1 Ch 386, CA (a disseisor is bound by the equity arising out of a restrictive covenant, but the principle applies equally to a trust, and the case was in substance an overruling of the old law).

6 See PARA 570 ante.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(1) NATURE OF EQUITABLE INTERESTS/(i) Equitable Interests in Land/603. Position of tenant for life.

### **603. Position of tenant for life.**

Apart from the consequences of the legal estate in settled land usually being vested in the tenant for life upon trusts<sup>1</sup>, a tenant for life has for long been treated for some purposes as a trustee for those entitled in remainder. Thus, although he may be expressly made unimpeachable for waste, so as not in general to be liable for acts of destruction done to the inheritance, yet, on the ground of his fiduciary position, equity interposes to prevent wanton destruction of a dwelling house, or of trees planted for ornament or shelter, and such waste is known as equitable waste<sup>2</sup>. Equitable waste, therefore, is treated as a breach of trust, and after the death of the tenant for life his assets are liable to make it good<sup>3</sup>.

In the case of a trust of land where the trustees have delegated to any beneficiary or beneficiaries of full age and beneficially entitled to an interest in possession in land subject to the trust any of their functions as trustees which relate to the land, beneficiaries to whom functions have been so delegated are, in relation to the exercise of those functions, in the same position as trustees, with the same duties and liabilities, although they are not to be regarded as trustees for any other purposes<sup>4</sup>.

1 As to the authorised method of settling land inter vivos established by the Settled Land Act 1925 s 4 see SETTLEMENTS vol 42 (Reissue) PARA 688 et seq; cf s 107 (as amended) (tenant for life or statutory owner trustee for all persons interested: see SETTLEMENTS vol 42 (Reissue) PARA 775). By the Trusts of Land and Appointment of Trustees Act 1996 s 2, it has not been possible, with very limited exceptions, to create a new settlement for the purposes of the Settled Land Act 1925 since the coming into force of the 1996 Act on 1 January 1997.

2 *Anon* (1704) Freem Ch 278; *Vane v Lord Barnard* (1716) 2 Vern 738; *Lawley v Lawley* (1717) Jac 71n; *Rolt v Lord Somerville* (1737) 2 Eq Cas Abr 759; *Coffin v Coffin* (1821) Jac 70; and see the Law of Property Act 1925 s 135; and SETTLEMENTS vol 42 (Reissue) PARA 997. As to the origin of the jurisdiction see *Aston v Aston* (1750) 1 Ves Sen 264 at 265 per Lord Hardwicke LC.

3 *Marquis of Ormonde v Kynersley* (1820) 5 Madd 369.

4 Trusts of Land and Appointment of Trustees Act 1996 s 9(1), (7), replacing the Law of Property Act 1925 s 29 (repealed).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(1) NATURE OF EQUITABLE INTERESTS/(i) Equitable Interests in Land/604. Equity to set aside or rectify a deed.

#### **604. Equity to set aside or rectify a deed.**

The legal owner of an estate in land who has conveyed it in such circumstances that, while the conveyance on the face of it is good, he is entitled in equity to have it set aside, has an equitable interest in the land which is analogous to the beneficial ownership. Consequently it can be devised<sup>1</sup>, and can be assigned, whether for value or by voluntary deed<sup>2</sup>. A right to rectification is likewise transmissible<sup>3</sup>.

If money has been paid for the legal conveyance, the equitable right is similar to an equity of redemption<sup>4</sup>, and the money must be repaid on the conveyance being set aside<sup>5</sup>. Similarly, a purchaser who has completed his contract may be entitled to impeach a title founded on fraud committed on his vendor, although, since the right to complain of a fraud is not a marketable commodity, a purchase of the estate for the purpose of acquiring a right to set aside a deed for fraud will not be assisted by a judgment for specific performance<sup>6</sup>.

1 *Stump v Gaby* (1852) 2 De GM & G 623; *Gresley v Mousley* (1859) 4 De G & J 78 at 93.

2 *Dickinson v Burrell, Stourton v Burrell* (1866) LR 1 Eq 337. To enable the assignee to sue, the assignment must, however, be of the assignor's entire interest in the property, and not of the mere right to sue: *Dickinson v Burrell, Stourton v Burrell* supra at 342 per Lord Romilly MR; cf *Prosser v Edmonds* (1835) 1 Y & C Ex 481 at 491; *Bruty v Edmundson* (1915) 85 LJ Ch 568; *Trendtex Trading Corp v Crédit Suisse* [1982] AC 679, [1981] 3 All ER 520, HL; and see CHOSSES IN ACTION vol 13 (2009) PARA 1 et seq.

3 *Blacklocks v JB Developments (Godalming) Ltd* [1982] Ch 183, [1981] 3 All ER 392; *Boots the Chemist Ltd v Street* (1983) 268 Estates Gazette 817.

4 *Blake v Johnson* (1700) Prec Ch 142. As to the equity of redemption see PARA 605 post.

5 *Stump v Gaby* (1852) 2 De GM & G 623 at 630 per Lord St Leonards LC ('in the view of this court he remains the owner, subject to the repayment of the money which has been advanced...'); cf *Earl of Aldborough v Trye* (1840) 7 Cl & Fin 436 at 463, HL.

6 *De Hughton v Money* (1866) 2 Ch App 164 at 169; and see SPECIFIC PERFORMANCE.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(1) NATURE OF EQUITABLE INTERESTS/(i) Equitable Interests in Land/605. Equity of redemption.

### 605. Equity of redemption.

An equitable estate formerly arose under a legal mortgage when the day fixed for redemption had passed without payment of the mortgage money. Until that day the mortgagor retained his legal right under the terms of the mortgage to a reconveyance on payment. After that day this right was forfeited at law, but the mortgagor was entitled to be relieved against the forfeiture in equity<sup>1</sup>, and the interest which he thus retained in the land was called an equity of redemption<sup>2</sup>.

The former Court of Chancery was jealous of preserving the equity of redemption and did not allow it to be clogged or fettered by any agreement entered into by the mortgagor and mortgagee at the time of the mortgage<sup>3</sup>. This remains an inflexible rule<sup>4</sup>.

Despite the changes made by the Law of Property Act 1925<sup>5</sup> in respect of the estates of mortgagor and mortgagee, the equity of redemption is still in the nature of an interest<sup>6</sup>; and as regards the conditions under which it may be asserted, and the manner in which it may be lost, the rules which applied to the equity of redemption under the former system apply to the right or equity of redemption under the present system.

1 The court, it was said (with some exaggeration), would relieve a mortgage to the tenth generation: *Bacon v Bacon* (1640) Toth 133. As to the equity of redemption see MORTGAGE vol 77 (2010) PARAS 107, 302 et seq.

2 This was an example of the intervention of equity to relieve against the strictness of the common law: see PARA 406 ante. The equity of redemption was not a mere right, but was an equitable estate in the land; the person entitled to the equity of redemption was considered as the owner of the land, while the interest held by the mortgagee was treated as part of his personal assets: *Casborne v Scarfe* (1738) 1 Atk 603; 2 White & Tud LC (8th Edn) 6; *Thornborough v Baker* (1675) 3 Swan 628 at 630. Hence, when this position was changed by foreclosure, the mortgagee, in acquiring for the first time the ownership of, and the beneficial title to, the land, took it under a newly accrued title: *Heath v Pugh* (1881) 6 QBD 345 at 360, CA, per Lord Selborne LC. The right of foreclosure results from the original interference of equity in favour of the mortgagor: see *Sampson v Pattison* (1842) 1 Hare 533 at 536. A mortgage by way of trust for sale was a mortgage only: *Re Alison, Johnson v Mounsey* (1879) 11 ChD 284 at 294, CA; *Locking v Parker* (1872) 8 Ch App 30.

3 *Howard v Harris* (1683) 1 Vern 190; *Jennings v Ward* (1705) 2 Vern 520; *Toomes v Conset* (1745) 3 Atk 261; *Re Edwards' Estate* (1861) 11 I Ch R 367. As to the former Court of Chancery see PARAS 401-403 ante.

4 *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25, HL. As to clogs on the equity of redemption see MORTGAGE vol 77 (2010) PARA 317 et seq.

5 As to these changes and their effect see MORTGAGE vol 77 (2010) PARA 187 et seq.

6 See *Re Wells, Swinburne-Hanham v Howard* [1933] Ch 29, CA. The equity of redemption can no longer be called an estate, since it is equitable: see the Law of Property Act 1925 s 1(3); and REAL PROPERTY vol 39(2) (Reissue) PARAS 45-46.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(1) NATURE OF EQUITABLE INTERESTS/(i) Equitable Interests in Land/606. Equitable securities.

## **606. Equitable securities.**

In addition to legal mortgages and charges expressed to be by way of legal mortgage there are various forms of security under which the creditor or other person entitled has only an equitable interest<sup>1</sup>. This was formerly so where the legal estate was outstanding in a prior mortgagee and a subsequent incumbrancer took a conveyance of the equity of redemption in the form of a legal mortgage; but now there can be more than one mortgage term, and each succeeding mortgagee has a legal estate<sup>2</sup>. It is still so where the mortgagor grants no term of years but an equitable charge is created<sup>3</sup>. However since the charge is contract-based it must be in writing to comply with the provisions<sup>4</sup> of the Law of Property (Miscellaneous Provisions) Act 1989<sup>5</sup>.

1 See MORTGAGE vol 77 (2010) PARAS 105-106, 118 et seq, 238 et seq.

2 See the Law of Property Act 1925 s 85(1), (2); and MORTGAGE vol 77 (2010) PARAS 104, 187, 190, 191. Section 85(2) does not now apply to registered land: see s 85(3) (amended by the Land Registration Act 2002 s 133, Sch 11 para 2(1), (6)).

3 See *Re Pidcock, Penny v Pidcock* (1907) 51 Sol Jo 514; *Thames Guaranty Ltd v Campbell* [1985] QB 210, [1984] 2 All ER 585, CA; but see the text and notes 4-5 infra.

4 See the Law of Property (Miscellaneous Provisions) Act 1989 s 2(1).

5 See *United Bank of Kuwait plc v Sahib* [1997] Ch 107, [1996] 3 All ER 215, CA; and MORTGAGE vol 77 (2010) PARA 118.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(1) NATURE OF EQUITABLE INTERESTS/(i) Equitable Interests in Land/607. Charges on land.

## 607. Charges on land.

Charges on land may also be created by will or settlement, and liens, such as a vendor's lien<sup>1</sup>, arise by operation of law. As regards such equitable mortgages or charges and equitable liens the chief distinction relates to the incumbrancer's remedy. An ordinary second mortgage in the form of a legal mortgage carries with it all the ordinary remedies of a mortgagee. The mortgagee is entitled to foreclose that mortgage and to redeem the prior mortgage. A charge accompanied by an agreement to execute a legal mortgage carries with it the same remedy of foreclosure<sup>2</sup>. A charge created by settlement or by will, however, carries with it a right of sale to be exercised with the help of the court<sup>3</sup>, but not a right of foreclosure; and in the case of an equitable lien the creditor must have recourse to the court to declare the lien and enforce it by sale<sup>4</sup>.

A charge may be created by covenant, as where a settlor covenants to charge an annuity on his real estate or on a specified part of it<sup>5</sup>; and a covenant to charge under a power, where the covenantor becomes mentally disordered before he can exercise it, may be assisted in equity as a defective execution of the power<sup>6</sup>. There is no charge, however, if the land to be subject to the covenant is not ascertained<sup>7</sup>, or if the settlor has an option of settling money instead of the annuity<sup>8</sup>. An agreement to execute a mortgage on request does not of itself give an immediate charge<sup>9</sup>. A charge may arise where an owner of land invites or encourages another to expend money on it on the faith of a promise that part of the land will be made over to him, and it is not possible to do so<sup>10</sup>.

1 See *Mackreth v Symmons* (1808) 15 Ves 329; 2 White & Tud LC (9th Edn) 848; *Kettlewell v Watson* (1884) 26 ChD 501, CA; and LIEN vol 68 (2008) PARA 859 et seq.

2 *Carter v Wake* (1877) 4 ChD 605 at 606 per Jessel MR; but see PARA 606 ante. See also MORTGAGE vol 77 (2010) PARA 566 et seq. Note that it is no longer possible to create a charge simply by the deposit of title deeds; since such a charge would be contract-based it must be in writing to comply with the provisions of the Law of Property (Miscellaneous Provisions) Act 1989 s 2(1): see *United Bank of Kuwait plc v Sahib* [1997] Ch 107, [1996] 3 All ER 215, CA; and MORTGAGE vol 77 (2010) PARA 118.

3 *Re Owen* [1894] 3 Ch 220.

4 See LIEN vol 68 (2008) PARAS 855, 880.

5 *Legard v Hodges* (1792) 1 Ves 477; *Ravenshaw v Hollier* (1834) 7 Sim 3; affd (1835) 4 LJ Ch 119; *Montagu v Earl of Sandwich* (1886) 32 ChD 525, CA.

6 *Affleck v Affleck* (1857) 3 Sm & G 394. As to defective execution of powers see POWERS vol 36(2) (Reissue) PARA 359 et seq.

7 *Fremoult v Dedire* (1718) 1 P Wms 429; *Williams v Lucas* (1789) 2 Cox Eq Cas 160; *Countess Mornington v Keane* (1858) 2 De G & J 292; and see *Averall v Wade* (1835) L & G temp Sugd 252 at 261; cf *Kennedy v Daly* (1804) 1 Sch & Lef 355 at 371 (agreement on marriage made in 1764 by a Roman Catholic in Ireland to convey all his real estate in strict settlement in case he should at any time be qualified by law to do so held not to constitute a charge on his estate until 1778, when the Roman Catholic disabilities were removed by the Roman Catholic Relief Act 1778).

8 *Ravenshaw v Hollier* (1834) 7 Sim 3; affd (1835) 4 LJ Ch 19.

9 *Shaw v Foster* (1872) LR 5 HL 321 at 334.

10 *Chalmers v Pardoe* [1963] 3 All ER 552, [1963] 1 WLR 677, PC (where for reasons of title the land could not be transferred). see also *Unity Joint-Stock Mutual Banking Association v King* (1858) 25 Beav 72; and LIEN vol 68 (2008) PARA 870 et seq. As to the circumstances in which such a promise gives rise to a proprietary estoppel in favour of the promisee see ESTOPPEL vol 16(2) (Reissue) PARA 1089 et seq.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(1) NATURE OF EQUITABLE INTERESTS/(ii) Equitable Interests in Personal Property and under Contracts/608. Equitable interests in personal property.

## (ii) Equitable Interests in Personal Property and under Contracts

### 608. Equitable interests in personal property.

Equitable interests may subsist in personal property by reason of the creation of trusts<sup>1</sup>; and upon a mortgage of personal property an equity of redemption will arise in favour of the mortgagor which will last until the property has been lawfully sold by the mortgagee, or until he has obtained a judgment for foreclosure or the debt is discharged<sup>2</sup>. To the legal and equitable interests thus co-existing the same principles apply as in the case of real property<sup>3</sup>. The burdens incident to the legal estate must be borne by the legal owner and cannot be enforced against the beneficiary who, on the other hand, is bound to indemnify the trustee against such burdens, and is entitled to the beneficial enjoyment of the property<sup>4</sup>.

1 A trust is the usual mode of creating successive interests in personal property (1 Fearn's Contingent Remainders (10th Edn, 1844) p 407), and is essential for this purpose in assignments inter vivos, although under wills a future interest could be created at law in chattels real by way of executory gift, and a future interest in chattels could be similarly created in equity (see *Vachel v Vachel* (1669) 1 Cas in Ch 129 at 130). Originally, in order to secure this effect, the preceding bequest for life must have been of the use of the chattels, not of the chattels themselves, but this distinction was abandoned (1 Fearn's Contingent Remainders (10th Edn, 1844) p 406), and the former practice of requiring the legatee for life to give security was also abandoned, and he was required instead to sign and deposit with the master an inventory of the goods (*Foley v Burnell* (1783) 1 Bro CC 274 at 279; affd (1785) 4 Bro Parl Cas 319, HL; *Conduitt v Soane* (1844) 1 Coll 285 at 286-287). The legatee for life is still entitled absolutely to things *quae usu consumuntur*: *Randall v Russell* (1817) 3 Mer 190; *Andrew v Andrew* (1845) 1 Coll 686 at 691. See also PERSONAL PROPERTY vol 35 (Reissue) PARA 1201 et seq; WILLS vol 50 (2005 Reissue) PARA 411 et seq. As to an equitable security on a life insurance policy see *Crossley v City of Glasgow Life Assurance Co* (1876) 4 ChD 421; and as to legal mortgages of life insurance policies see MORTGAGE vol 77 (2010) PARA 233 et seq.

2 Foreclosure or sale is the appropriate remedy in the case of personal property not passing by delivery (*London and Midland Bank v Mitchell* [1899] 2 Ch 161; *Harrold v Plenty* [1901] 2 Ch 314); but where the property passes by delivery, the mortgage operates by way of pledge, and foreclosure does not lie (*Carter v Wake* (1877) 4 ChD 605).

3 See PARA 602 ante. For an example of the elementary principles in a case of much complexity see *Vandervell v IRC* [1967] 2 AC 291 at 313-317, [1967] 1 All ER 1 at 8-10, HL, per Lord Upjohn. As to the various classes of trusts, express, constructive and resulting, see PARAS 851-853 post; and TRUSTS vol 48 (2007 Reissue) PARA 624 et seq.

4 Thus a trustee or legal mortgagee of shares is liable for calls, but is entitled to be indemnified by his beneficiary (see eg *Hardoon v Belilios* [1901] AC 118, PC; and COMPANIES vol 14 (2009) PARA 343), and he holds 'in his own right' so as to be qualified, where this is a requirement, for directorship (see eg *Pulbrook v Richmond Consolidated Mining Co* (1878) 9 ChD 610; and COMPANIES vol 14 (2009) PARA 497). Similarly, a trustee or a mortgagee by assignment of leasehold property is liable at law upon the covenants in the lease (*Gretton v Diggles* (1813) 4 Taunt 766), but the beneficiary is bound to indemnify him (*Close v Wilberforce* (1838) 1 Beav 112; see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 573). The company or landlord may be able to make use of the trustee's right of indemnity so as, in effect, to secure payment by the beneficiary: see TRUSTS vol 48 (2007 Reissue) PARAS 902, 904.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(1) NATURE OF EQUITABLE INTERESTS/(ii) Equitable Interests in Personal Property and under Contracts/609. Equitable interests under contracts.

### 609. Equitable interests under contracts.

The doctrine of trusts applies also to contracts; and, where equity can spell out of a contract made between A and B for the benefit of C the construction that B intended to contract as trustee for C, even though nothing was said about any trust in the contract<sup>1</sup>, C is a beneficiary under the contract and is allowed in equity to enforce it<sup>2</sup>. Thus under articles of partnership a trust may be created in favour of the widow of one of the partners<sup>3</sup> and, on the same principle, where charterers of a ship in their charterparty with the owner have stipulated that a commission should be paid to the brokers, the brokers, though not parties to the charterparty, are treated as beneficiaries and are entitled to enforce the agreement against the owners<sup>4</sup>; and the assured under a policy of insurance may be constituted a trustee for a third party of the insurance moneys<sup>5</sup>. In a settlement by way of covenant equity may interfere in favour of a volunteer<sup>6</sup> even though the deed has been kept by the settlor until his death, and not communicated to the trustees or the beneficiary<sup>7</sup>; and volunteers who are defeated by the covenantor's conveying away trust property may, after his death, claim against assets<sup>8</sup>. Where a right is held by a trustee for the benefit of certain beneficiaries, proceedings to enforce the right should be brought in the name of the trustee; but, if he refuses to sue, the beneficiaries may, where justice demands it, themselves enforce the right in a claim to which the trustee is made a party, and may do so whether it is an express or a constructive trust, and whether the right to be enforced is a right arising under a deed or a signed writing<sup>9</sup>.

The equitable rules set out above are unaffected by the Contracts (Rights of Third Parties) Act 1999 although in practice it will less often be necessary to rely on them. That Act provides that a person who is not a party to a contract (a 'third party') may in his own right enforce a term of the contract if (1) the contract expressly provides that he may<sup>10</sup>; or (2) the term purports to confer a benefit on him and it does not appear, on a proper construction of the contract, that the parties did not intend the term to be enforceable by the third party<sup>11</sup>. The provisions of the 1999 Act are discussed elsewhere in this work<sup>12</sup>.

1 *Re Webb, Barclays Bank Ltd v Webb* [1941] Ch 225, [1941] 1 All ER 321; *Re Foster's Policy, Menneer v Foster* [1966] 1 All ER 432, [1966] 1 WLR 222. The contract must, however, show a clear intention to create a trust in favour of a third party. It is not legitimate to import into a contract the idea of a trust when the parties have given no indication that such was their intention: *Re Schebsman, ex p Official Receiver, Trustee v Cargo Superintendents (London) Ltd and Schebsman* [1944] Ch 83 at 89, [1943] 2 All ER 768 at 770, CA, per Lord Greene MR; and see *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL; *Swain v Law Society* [1983] 1 AC 598, [1982] 2 All ER 827, HL.

2 *Tomlinson v Gill* (1756) Amb 330; *Gregory and Parker v Williams* (1817) 3 Mer 582; cf *Re Empress Engineering Co* (1880) 16 ChD 125, CA; *Gandy v Gandy* (1885) 30 ChD 57, CA; *Kelly v Larkin and Carter* [1910] 2 IR 550. The trustee may sue: *Lloyd's v Harper* (1880) 16 ChD 290, CA. Persons who are unascertained at the date of the contract may still be entitled to a benefit under it on this principle: *Lamb v Vice* (1840) 6 M & W 467; *Robertson v Wait* (1853) 8 Exch 299; *Lloyd's v Harper* supra; *Swain v Law Society* [1980] 3 All ER 615 at 624, [1980] 1 WLR 1335 at 1344 per Slade J (revsd [1981] 3 All ER 797, [1982] 1 WLR 17, CA, without casting any doubt on this dictum; decision of the Court of Appeal revsd on different grounds [1983] 1 AC 598, [1982] 2 All ER 827, HL). See also CONTRACT vol 9(1) (Reissue) PARAS 760-762. Cf the position under the Contracts (Rights of Third Parties) Act 1999 (see the text and notes 10-12 infra), which provides that the third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into: see s 1(3).

3 *Page v Cox* (1852) 10 Hare 163; *Re Flavell, Murray v Flavell* (1883) 25 ChD 89, CA.

4 *Robertson v Wait* (1853) 8 Exch 299; *Les Affréteurs Réunis SA v Leopold Walford (London) Ltd* [1919] AC 801, HL.

5 *Royal Exchange Assurance v Hope* [1928] Ch 179, CA; *Re Gordon, Lloyds Bank and Parratt v Lloyd and Gordon* [1940] Ch 851; *Re Webb, Barclays Bank Ltd v Webb* [1941] Ch 225, [1941] 1 All ER 321; *Prudential Staff Union v Hall* [1947] KB 685; *Re Foster's Policy, Menneer v Foster* [1966] 1 All ER 432, [1966] 1 WLR 222. The burden of establishing a trust is not easy to discharge: see *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70, PC; *Re Schebsman, ex p Official Receiver, Trustee v Cargo Superintendents (London) Ltd and Schebsman* [1944] Ch 83, [1943] 2 All ER 768, CA; *Green v Russell* [1959] 2 QB 226, [1959] 2 All ER 525, CA.

6 *Gale v Gale* (1877) 6 ChD 144.

7 *Fletcher v Fletcher* (1844) 4 Hare 67; and see *Bridge v Bridge* (1852) 16 Beav 315 at 321; cf *Re Cook's Settlement Trusts, Royal Exchange Assurance v Cook* [1965] Ch 902, [1964] 3 All ER 898 (where the volunteers were not parties to the covenant). Where the settlement by way of covenant was not complete as formerly in the case of a covenant to surrender copyholds, equity would not interfere: *Jefferys v Jefferys* (1841) Cr & Ph 138; *Dening v Ware* (1856) 22 Beav 184. The covenantee's equitable interest before conveyance is commensurate only with that which a court of equity would decree in granting specific performance: *Central Trust and Safe Deposit Co v Snider* [1916] 1 AC 266, PC.

8 *Williamson v Codrington* (1750) 1 Ves Sen 511.

9 *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1, HL, considered in *Baxter International Inc v Netherlands Produktielaboratorium voor Bloedtransfusiapparatuur BV* [1998] RPC 250; and see *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70 at 79, PC; *Harmer v Armstrong* [1934] Ch 65 at 87, 90, CA;

10 Contracts (Rights of Third Parties) Act 1999 s 1(1)(a).

11 *Ibid* s 1(1)(b), (2).

12 See CONTRACT.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(1) NATURE OF EQUITABLE INTERESTS/(ii) Equitable Interests in Personal Property and under Contracts/610. Imperfect gifts not assisted.

## **610. Imperfect gifts not assisted.**

Equitable interests in property may be created in favour of volunteers, but a court of equity does not interfere to perfect an imperfect gift<sup>1</sup>. In order to render a voluntary settlement valid and effectual the settlor must either:

- 63 (1) have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done to transfer the property, and to render the settlement binding on him; this is effected when he actually transfers his own interest in the property to the donee or to trustees for the donee; or
- 64 (2) while retaining the property in himself, have declared himself to be a trustee of it for the donee<sup>2</sup>.

The court does not, however, treat an imperfect gift by way of transfer as a declaration of trust<sup>3</sup>. Exceptionally, where the legal title remains vested in the donor who yet has done everything in his power to make the transfer effective, the property is regarded as effectively transferred in equity, the donor retaining the bare legal title on trust for the donee<sup>4</sup>. In the case of shares, delivery of the transfer form to the transferee or the company is normally required but delivery may be dispensed with in some circumstances where it would be unconscionable for the transferor to recall the gift<sup>5</sup>.

If the donor has only an equitable interest vested in him, the gift is effectually made by an assignment of this interest<sup>6</sup>, and notice to the trustees is not essential<sup>7</sup>; similarly, a chose in action may be given by an equitable assignment without notice to the debtor<sup>8</sup>. If there is an intention to give property or release a debt, and the legal estate in the property becomes vested in the donee or the debt becomes extinguished at law, though not in equity, this completes the gift or release<sup>9</sup>.

1 See the early cases collected in the note to *Ward v Audland* (1845) 8 Beav 201 at 213; and GIFTS vol 52 (2009) PARA 267. But although equity will not aid a volunteer, it will not strive officiously to defeat a gift: see *T Choithram International SA v Pagarani* [2001] 2 All ER 492 at 501, [2001] 1 WLR 1 at 11, PC, per Lord Browne-Wilkinson, cited by Arden LJ in *Pennington v Waine* [2002] EWCA Civ 227 at [60], [2002] 4 All ER 215, [2002] 1 WLR 2075.

2 See, however, *T Choithram International SA v Pagarani* [2001] 2 All ER 492, [2001] 1 WLR 1, PC, which appears to establish an intermediate case. The settlor (now deceased) had executed a trust deed, of which he was one of the trustees, setting up a charitable foundation, and had immediately afterwards orally purported to give all his wealth to the foundation. No transfers of the assets took place in his lifetime, though they were registered in the names of the surviving trustees of the foundation after his death. It was held that the words 'I give to the foundation' could only mean 'I give to the trustees of the foundation trust deed to be held by them on the trusts of the foundation trust deed'; although his words were apparently words of outright gift they were essentially words of gift on trust. In one composite transaction on the same day the settlor had declared that he was giving property to a trust which he himself had established and of which he had appointed himself one of the trustees. His conscience was affected and it would be unconscionable and contrary to the principles of equity to allow him to resile from his gift. In the absence of special factors, where one out of a larger body of trustees has the trust property vested in him, he is bound by the trust and must give effect to it by transferring the trust property into the names of all the trustees. The trustees of the foundation accordingly held the assets on the trusts of the foundation trust deed.

3 *Milroy v Lord* (1862) 4 De GF & J 264 at 274 per Turner LJ; *Richards v Delbridge* (1874) LR 18 Eq 11; *Re Wale, Wale v Harris* [1956] 3 All ER 280, [1956] 1 WLR 1346.

4 *Re Rose* [1952] Ch 499, [1951] 1 All ER 1217, CA; *Re Fry, Chase National Executors and Trustee Corp v Fry* [1946] Ch 312, [1946] 2 All ER 106; *Re Rose, Midland Bank Executor and Trustee Co Ltd v Rose* [1949] Ch 78, [1948] 2 All ER 971; *Vandervell v IRC* [1967] 2 AC 291 at 330, [1967] 1 All ER 1 at 18, HL per Lord Wilberforce.

5 *Pennington v Waine* [2002] EWCA Civ 227, [2002] 4 All ER 215, [2002] 1 WLR 2075. The statement in the text represents the view of Arden LJ with whom Schiemann LJ agreed. Clarke LJ, however, considered that signing a transfer form without any intention of revoking it in the future constituted in itself a valid equitable assignment without any need for delivery: see at [83] et seq.

6 *Kekewich v Manning* (1851) 1 De GM & G 176; and see *Gilbert v Overton* (1864) 2 Hem & M 110; *Ellison v Ellison* (1802) 6 Ves 656; *Re McArdle* [1951] Ch 669, [1951] 1 All ER 905, CA.

7 *Donaldson v Donaldson* (1854) Kay 711.

8 *Harding v Harding* (1886) 17 QBD 442; and see CHOSER IN ACTION vol 13 (2009) PARA 40.

9 This happens when the property becomes vested in the donee or debtor as executor or administrator: *Strong v Bird* (1874) LR 18 Eq 315; *Re Innes, Innes v Innes* [1910] 1 Ch 188; *Re Pink, Pink v Pink* [1912] 2 Ch 528, CA; *Re Goff, Fetherstonhough v Murphy* (1914) 136 LT 510; *Re James, James v James* [1935] Ch 449; *Re Stewart, Stewart v McLaughlin* [1908] 2 Ch 251; *Re Gonin* [1979] Ch 16; sub nom *Re Gonin, Gonin v Garmeson* [1977] 2 All ER 720.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(2) EQUITABLE INTERESTS UNDER CONTRACTS FOR SALE/611. Purchaser's equitable interest.

## **(2) EQUITABLE INTERESTS UNDER CONTRACTS FOR SALE**

### **611. Purchaser's equitable interest.**

Upon the signing of a contract for the sale of land<sup>1</sup> a change takes place in the equitable, but not the legal, interest in the land. At law the purchaser has no right to the land, nor the vendor to the money, until the conveyance is executed<sup>2</sup>. In equity, however, if the contract is one of which specific performance would be ordered<sup>3</sup>, the beneficial interest passes to the purchaser immediately on the signing of the contract, and thereupon the vendor, in regard to his legal ownership and possession of the land, becomes constructively a trustee for the purchaser<sup>4</sup>. This is said to be an application of the maxim<sup>5</sup> that in the eyes of equity that which ought to have been done is to be treated as having been done<sup>6</sup>. As such a trustee the vendor is bound to take reasonable care of the property, since the purchaser is entitled to have it handed over to him on completion in the same condition as when he entered into the contract<sup>7</sup>. From the date of the contract, however, the property is at the risk of the purchaser, and he has no claim against the vendor for depreciation which is not due to the vendor's neglect<sup>8</sup>, but he is entitled to accessions to the value<sup>9</sup>. Before the purchaser can be required to complete, the vendor must make out his title; but, pending completion, he retains an interest in the property, since it forms the security for the purchase money, and a right to assert that interest if anything should be done in derogation of it<sup>10</sup>.

1 See SALE OF LAND vol 42 (Reissue) PARA 177 et seq.

2 *Fludyer v Cocker* (1805) 12 Ves 25 at 27; *Laird v Pim* (1841) 7 M & W 474; *East London Union v Metropolitan Rly Co* (1869) LR 4 Exch 309 at 310.

3 *Cornwall v Henson* [1899] 2 Ch 710; revsd on the facts [1900] 2 Ch 298, CA; *Howard v Miller* [1915] AC 318 at 326, PC; and see SPECIFIC PERFORMANCE.

4 *Green v Smith* (1738) 1 Atk 572; *Hadley v London Bank of Scotland* (1865) 3 De GJ & Sm 63 at 70; *Shaw v Foster* (1872) LR 5 HL 321 at 338 per Lord Cairns and at 356 per Lord Hatherley LC. The purchaser's equitable interest is not destroyed if the vendor is a company which is placed in receivership by a debenture holder: *Freevale Ltd v Metrostore (Holdings) Ltd* [1984] Ch 199, [1984] 1 All ER 495.

5 See PARAS 561-562 ante.

6 *Swiss Bank Corp'n v Lloyds Bank Ltd* [1979] Ch 548 at 565, [1979] 2 All ER 853 at 865-866 per Browne-Wilkinson J; varied without affecting this point [1982] AC 584, [1980] 2 All ER 419, CA; [1982] AC 584, [1981] 2 All ER 449, HL.

7 *Foster v Deacon* (1818) 3 Madd 394; *Cumberland Consolidated Holdings Ltd v Ireland* [1946] KB 264, [1946] 1 All ER 284; *Phillips v Lamdin* [1949] 2 KB 33, [1949] 1 All ER 770. See also *Sinclair-Hill v Sothcott* (1973) 26 P & CR 490 (vendor under obligation not to withdraw planning application without consent of purchaser); *Lake v Bayliss* [1974] 2 All ER 1114, [1974] 1 WLR 1073 (vendor who after contract sold to a third party for valuable consideration accountable as trustee to the original purchaser).

8 *Robertson v Skelton* (1849) 12 Beav 260.

9 *Vesey v Elwood* (1842) 3 Dr & War 74 at 79.

10 *Shaw v Foster* (1872) LR 5 HL 321. It has been much discussed whether the vendor's lien upon the property places him, while he remains in possession, on the footing of a mortgagee so as to render him

accountable, without special circumstances, for wilful default. According to *Sherwin v Shakspear* (1854) 5 De GM & G 517, he is a trustee rather than a mortgagee, and chargeable for wilful default only on special circumstances being shown; but in *Phillips v Silvester* (1872) 8 Ch App 173 at 176, Lord Selborne LC put him on the footing of a mortgagee in possession, and this case, though it is said to have been disapproved by Jessel MR when the cause came on before him on further consideration (not reported; but see 1 Dart's Law relating to Vendors and Purchasers of Real Estate (8th Edn, 1929) p 563), has been treated as stating the existing law: *Royal Bristol Permanent Building Society v Bomash* (1887) 35 ChD 390 at 398. An unpaid or partly-paid vendor of shares is entitled to exercise voting rights: *Musslewhite v CH Musslewhite & Son Ltd* [1962] Ch 964, [1962] 1 All ER 201. The purchaser is not entitled to an allowance for deterioration happening after he has taken possession or after a title has been shown under which he could safely take possession: *Binks v Lord Rokeby* (1818) 2 Swan 222 at 226; *Minchin v Nance* (1841) 4 Beav 332.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(2) EQUITABLE INTERESTS UNDER CONTRACTS FOR SALE/612. Date for completion of sale.

## **612. Date for completion of sale.**

The date for completion specified in the contract does not affect the equitable relation of vendor and purchaser. Before this date the purchaser is already equitable owner subject to his completing the purchase. The date marks the time when the purchaser becomes entitled to the rents and profits, and the vendor to interest on the unpaid purchase money<sup>1</sup>. If no date is fixed by the contract, the date for completion is the time when the vendor has made out his title and when, therefore, the purchaser could safely take possession<sup>2</sup>.

Where the vendor has entered into a subsequent contract for sale, the first purchaser, provided his contract is specifically enforceable<sup>3</sup>, has the better title, and can assert it in a claim for specific performance against the vendor and the second purchaser, unless the latter has obtained the legal estate without notice<sup>4</sup>.

1 *Esdaile v Stephenson* (1822) 1 Sim & St 122.

2 *Carrodus v Sharp* (1855) 20 Beav 56; *Barsht v Tagg* [1900] 1 Ch 231 at 235.

3 *Goodwin v Fielding* (1853) 4 De GM & G 90. The court will not compel a defendant specifically to perform an agreement where this would result in unfairness as, for example, if it would result in compelling the defendant to commit a breach of a prior agreement with another person: *Willmott v Barber* (1880) 15 ChD 96; *Warmington v Miller* [1973] QB 877, [1973] 2 All ER 372, CA; and see SPECIFIC PERFORMANCE.

4 *Potter v Sander* (1846) 6 Hare 1. A contract for the sale of a legal estate in land is registrable as an estate contract: see PARA 577 ante; and LAND CHARGES.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(i) Covenants running with the Land/613. Covenants in leases.

### **(3) RESTRICTIVE COVENANTS**

#### **(i) Covenants running with the Land**

#### **613. Covenants in leases.**

The Landlord and Tenant (Covenants) Act 1995<sup>1</sup> provides that in relation to a new tenancy<sup>2</sup> the benefit and burden of all landlord and tenant covenants<sup>3</sup> of a tenancy are annexed and incident to the whole, and to each and every part, of the premises demised by the tenancy and of the reversion in them, and pass on an assignment of the whole or any part of those premises or of the reversion in them<sup>4</sup>. The 1995 Act applies to a landlord covenant or a tenant covenant of a tenancy whether or not the covenant has reference to the subject matter of the tenancy<sup>5</sup> and whether the covenant is express, implied or imposed by law<sup>6</sup>. Certain covenants imposed by statute are, however, excluded<sup>7</sup>.

The 1995 Act further provides that any landlord or tenant covenant of a tenancy which is restrictive of the user of land is, as well as being capable of enforcement against an assignee, capable of being enforced against any other person who is the owner or occupier of any demised premises<sup>8</sup> to which the covenant relates, even though there is no express provision in the tenancy to that effect<sup>9</sup>.

Nothing in the above provisions operates:

- 65 (1) in the case of a covenant which, in whatever terms, is expressed to be personal to any person, to make the covenant enforceable by or, as the case may be, against any other person; or
- 66 (2) to make a covenant enforceable against any person if it would not otherwise be enforceable against him by reason of its not having been registered under the Land Registration Act 2002 or the Land Charges Act 1972<sup>10</sup>.

In relation to a tenancy other than a new tenancy, the pre-existing law continues to apply. Under that law as between landlord and tenant both the burden and the benefit of a covenant which touches and concerns<sup>11</sup> the land, and is not merely personal or collateral<sup>12</sup>, run with the reversion and the term at law<sup>13</sup>. Where, however, the relationship of the parties is, for example, that of landlord and undertenant, there is neither privity of contract nor privity of estate between them and neither party may sue the other or be sued by him at law upon the covenants in the lease<sup>14</sup>.

1 For a full discussion of the Landlord and Tenant (Covenants) Act 1995 see LANDLORD AND TENANT 27(1) (2006 Reissue) PARA 576 et seq).

2 For these purposes, a tenancy is a new tenancy if it is granted on or after 1 January 1996 otherwise than in pursuance of (1) an agreement entered into before that date; or (2) an order of a court made before that date: *ibid* s 1(3). The provisions set out in the text and notes 3-10 *infra* only apply to new tenancies (see s 1(1)) while ss 17-20 relating to guarantees apply to both new and old tenancies (see s 1(2)). Without prejudice to the generality of s 1(3), that provision applies to the grant of a tenancy where by virtue of any variation of a tenancy there is a deemed surrender and regrant as it applies to any other grant of a tenancy: s 1(5). Where a tenancy granted on or after 1 January 1996 is so granted in pursuance of an option granted before that date,



the tenancy is regarded for the purposes of s 1(3) as granted in pursuance of an agreement entered into before that date (and accordingly is not a new tenancy), whether or not the option was exercised before that date; and 'option' includes right of first refusal: s 1(6), (7).

3 For these purposes, 'landlord covenant', in relation to a tenancy, means a covenant falling to be complied with by the landlord of premises demised by the tenancy; 'tenant covenant', in relation to a tenancy, means a covenant falling to be complied with by the tenant of premises demised by the tenancy; 'tenancy' means any lease or other tenancy and includes a sub-tenancy and an agreement for a tenancy, but does not include a mortgage term; 'landlord' and 'tenant', in relation to a tenancy, mean the person for the time being entitled to the reversion expectant on the term of the tenancy and the person so entitled to that term respectively; and 'covenant' includes term, condition and obligation, and references to a covenant (or any description of covenant) of a tenancy include a covenant (or a covenant of that description) contained in a collateral agreement: *ibid* s 28(1).

4 *Ibid* s 3(1). Nothing in the Law of Property Act 1925 ss 78, 79 (benefit and burden of covenants relating to land: see PARA 618 *post*) or ss 141, 142 (running of benefit and burden of covenants with reversion: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 567 *et seq*), applies in relation to new tenancies: Landlord and Tenant (Covenants) Act 1995 s 30(4).

5 Or, in older terminology, touches and concerns the land: see note 11 *infra*.

6 Landlord and Tenant (Covenants) Act 1995 s 2(1).

7 See *ibid* s 2(2).

8 The 'demised premises' means any of the premises demised by the lease in question: *Oceanic Village Ltd v United Attractions Ltd* [2000] Ch 234, [2000] 1 All ER 975.

9 Landlord and Tenant (Covenants) Act 1995 s 3(5).

10 *Ibid* s 3(6) (amended by the Land Registration Act 2002 s 133, Sch 11 para 33(1), (2)).

11 Eg a covenant to pay rent: *Parker v Webb* (1693) 3 Salk 5. A covenant taken for the protection of trade carried on upon the covenantee's protected land may touch and concern that land: *Newton Abbott Co-operative Society v Williamson and Treadgold Ltd* [1952] Ch 286, [1952] 1 All ER 279; *Marten v Flight Refuelling Ltd* [1962] Ch 115, [1961] 2 All ER 696; *Re Quaffers Ltd's Application* (1988) 56 P & CR 142, Lands Tribunal.

12 Eg in a public house lease, a covenant not to keep a public house within half a mile of the demised premises: *Thomas v Hayward* (1869) LR 4 Exch 311. See *System Floors Ltd v Ruralpride Ltd* [1994] NPC 127, [1995] 1 EGLR 48, CA (a covenant allowing a lessee to surrender the lease may bind a successor in title to the reversion even if the covenant is personal to the lessee).

13 The proposition stated in the text is based upon the doctrines laid down in *Spencer's Case* (1583) 5 Co Rep 16a; 1 Smith's LC (13th Edn) 51; and upon statutory extensions of those doctrines introduced by 32 Hen 8 c 34 (Grantees of Reversions) (1540); the Conveyancing Act 1881 ss 10, 11; and the Conveyancing Act 1911 s 2, all now repealed and reproduced in the Law of Property Act 1925 ss 141, 142: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 567 *et seq*. Formerly, when the covenant related to a thing not in existence at the time of the demise, the lessee's assigns had to be named to make it binding on them: second resolution in *Spencer's Case* *supra*; and see *Minshull v Oakes* (1858) 2 H & N 793; *Dewar v Goodman* [1909] AC 72 at 77, HL. This was, however, altered by the Law of Property Act 1925 s 79. For the meaning of covenants at law as between landlord and tenant see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 559.

14 *South of England Dairies Ltd v Baker* [1906] 2 Ch 631.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(i) Covenants running with the Land/614. Covenants, other than those between landlord and tenant, running with the land at law.

#### **614. Covenants, other than those between landlord and tenant, running with the land at law.**

As between persons other than landlord and tenant the benefit<sup>1</sup> of a covenant, whether positive or negative, may run with the land at law if it touches and concerns the land<sup>2</sup>. The covenantee, at the time of making the covenant, must have had a legal estate in the land which is to be benefited<sup>3</sup>, and the assignee claiming the benefit must be able to show that he is a successor in title of the covenantee, or a person deriving title under the covenantee or under his successors in title<sup>4</sup>; and it may so run where the covenantor has never even had any interest in the land and there is no servient tenement<sup>5</sup>. There must be an intention that the benefit should run with the land owned by the covenantee at the date of the covenant<sup>6</sup>. Moreover, the benefit of a covenant relating to land may be assignable under the Law of Property Act 1925<sup>7</sup> either where it is so expressed that an intention that it should be assignable is shown, or where from its nature the attribute of assignability should be imputed to it<sup>8</sup>. Further it appears that a successor in title of the covenantee may be able to bring a claim in contract in his own right under the Contracts (Rights of Third Parties) Act 1999<sup>9</sup>. In order to be able to bring such a claim, the third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into<sup>10</sup>; a successor in title, whether express or implied<sup>11</sup>, may fall within this definition of a third party.

The burden, however, will never run at law<sup>12</sup> and there is nothing in the 1999 Act to affect this rule. Subject to the expression of a contrary intention, a covenant made after 1881 operates to bind the covenantor's real estate as well as his personal estate<sup>13</sup>.

1 See eg *Cooke v Chilcott* (1876) 3 ChD 694; *Austerberry v Oldham Corp*n (1885) 29 ChD 750 at 776, 778, CA; *Shayler v Woolf* [1946] 1 All ER 464 at 467 per Roxburgh J; affd but not on this point [1946] Ch 320, [1946] 2 All ER 54, CA; *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500, [1949] 2 All ER 179, CA; and SALE OF LAND vol 42 (Reissue) PARA 331 et seq.

The benefit of a covenant relating to land entered into after 31 December 1925 may be made to run with the land without the use of any technical expression if the covenant is of such a nature that the benefit could have been made to run with the land before 1 January 1926: Law of Property Act 1925 s 80(3). For these purposes, a covenant runs with the land when the benefit or burden of it, whether at law or in equity, passes to the successors in title of the covenantee or the covenantor, as the case may be: s 80(4). The benefit of the covenant cannot run at law or in equity with land in which the covenantee had no estate or interest at the time of the covenant: *Torrey Hotel Ltd v Jenkins* [1927] 2 Ch 225.

The benefit of a covenant to pay a rentcharge does not, however, run with the rentcharge (*Grant v Edmondson* [1931] 1 Ch 1, CA); nor does the benefit of a covenant to repair a road run with land retained near it, because it does not touch and concern that land (*Austerberry v Oldham Corp*n supra).

2 *Mayor etc of Congleton v Pattison* (1808) 10 East 130: 'the covenant must either affect the land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land', cited by Farwell J in *Rogers v Hosegood* [1900] 2 Ch 388 at 395; affd at 403, CA, but on a somewhat different point; *Re Gadd's Land Transfer, Cornmill Development Ltd v Bridle Land (Estates) Ltd* [1966] Ch 56, [1965] 2 All ER 800 (road benefited by covenants); *Kumar v Dunning* [1989] QB 193, [1987] 2 All ER 801, CA; *P & A Swift Investments (a firm) v Combined English Stores Group plc* [1989] AC 632, [1988] 2 All ER 885, HL; *Caerns Motor Services Ltd v Texaco Ltd* [1995] 1 All ER 247; and see *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500 at 507, [1949] 2 All ER 179 at 186, CA, per Tucker LJ; *Bridges v Harrow London Borough* (1981) 260 Estates Gazette 284. Whether a covenant benefits the dominant land is a question of fact to be determined on the evidence: *Marten v Flight Refuelling Ltd* [1962] Ch 115,

[1961] 2 All ER 696; *Earl of Leicester v Wells-next-the-Sea UDC* [1973] Ch 110, [1972] 3 All ER 77; *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798. The test to be applied is in general the same as that for covenants in leases: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 559.

3 *Webb v Russell* (1789) 3 Term Rep 393 at 402.

4 *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500, [1949] 2 All ER 179, CA; *Williams v Unit Construction Co Ltd* (1955) 19 Conv NS 262, CA; *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 All ER 371, [1980] 1 WLR 594, CA; and see the Law of Property Act 1925 s 78 (cited in para 618 post). The law before 1 January 1926 required the person claiming the benefit to be entitled to the same estate in the land as that to which the covenantee was entitled: *Webb v Russell* (1789) 3 Term Rep 393.

5 *The Prior's Case* (1368) Co Litt 385a; *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500, [1949] 2 All ER 179, CA; *Pinemain Ltd v Welbeck International Ltd* (1984) 272 Estates Gazette 1166 (not followed in *Coastplace Ltd v Hartley* [1987] QB 948, [1987] 2 WLR 1299).

6 *Rogers v Hosegood* [1900] 2 Ch 388 at 396 per Farwell J, affd [1900] 2 Ch 388 at 403, CA; *Shayler v Woolf* [1946] Ch 320, [1946] 2 All ER 54, CA; *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500, [1949] 2 All ER 179, CA.

7 *le* under the Law of Property Act 1925 s 136 (as amended) which provides that the assignment must be in writing and express notice in writing must be given to the covenantor: see s 136(1); and CHOSSES IN ACTION vol 13 (2009) PARA 72 et seq.

8 See eg *Shayler v Woolf* [1946] 1 All ER 464 at 467; affd [1946] Ch 320, [1946] 2 All ER 54, CA. As to the implication of words referring to successors in title see PARA 618 notes 1, 5 post; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 256.

9 As to the ability of a person who is not a party to a contract (a 'third party') to enforce a term of the contract in his own right under the Contracts (Rights of Third Parties) Act 1999 see s 1(1), (2) cited in para 609 the text and notes 10-11 ante; and CONTRACT.

10 *Ibid* s 1(3).

11 *le* under the Law of Property Act 1925 s 78: see PARA 618 post.

12 *Austerberry v Oldham Corp'n* (1885) 29 ChD 750, CA; *E and GC Ltd v Bate* (1935) 79 L Jo 203; *Jones v Price* [1965] 2 QB 618, [1965] 2 All ER 625, CA (positive covenants). A positive covenant in a deed may, however, be enforced against successors in title where the benefit is conditional on the undertaking of the burden: *Halsall v Brizell* [1957] Ch 169, [1957] 1 All ER 371. In *Thamesmead Town Ltd v Allotey* (1998) 79 P & CR 557, [1998] 3 EGLR 97, CA, it was pointed out that the reasoning of Lord Templeman in *Rhone v Stephens* [1994] 2 AC 310, [1994] 2 All ER 65, HL, suggests there are two requirements for the enforceability of a positive covenant against a successor in title to the covenantor. The first is that the condition of discharging the burden must be relevant to the exercise of the rights that enable the benefit to be obtained. The second is that the successors in title must have the opportunity to choose whether to take the benefit or, having taken it, to renounce it, even if only in theory, and thereby to escape the burden and that the successors in title can be deprived of the benefit if they fail to assume the burden.

13 See the Law of Property Act 1925 s 80(1) (amended by the Law of Property (Miscellaneous Provisions) Act 1989 s 1(8), Sch 1 para 4); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 256.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(i) Covenants running with the Land/615. Covenants running with the land in equity.

## 615. Covenants running with the land in equity.

The equitable doctrine relating to restrictive covenants<sup>1</sup> is confined to covenants of a negative nature, for equity is slow to give its aid in enforcing positive covenants<sup>2</sup>. It is sufficient if the covenant is negative in substance though not in form<sup>3</sup>; and a covenant partly positive and partly negative, if severable, will be enforced so far as it is negative<sup>4</sup>.

A considerably wider range of persons may sue and be sued in equity on restrictive covenants, provided that certain conditions are present<sup>5</sup>, than was possible at law. There is, for example, no need for there to be privity of estate between the claimant and the defendant<sup>6</sup>; the burden of a restrictive covenant entered into between a vendor and a purchaser may pass in equity<sup>7</sup>; and an undertenant<sup>8</sup> or other occupier<sup>9</sup> may be bound by such a covenant. A beneficiary under a trust whose trustees are bare trustees of the benefit of a restrictive covenant may sue on the covenant without making the bare trustees parties to the claim<sup>10</sup>.

1 This doctrine was first established by *Tulk v Moxhay* (1848) 2 Ph 774.

2 Eg a covenant to repair, on the ground that equity will not compel a person to do something that will involve him in expense: *Haywood v Brunswick Building Society* (1881) 8 QBD 403, CA; *London and South Western Rly Co v Gomm* (1882) 20 ChD 562, CA; *Austerberry v Oldham Corp* (1885) 29 ChD 750, CA; *Hall v Ewin* (1887) 37 ChD 74, CA; *Smith v Colbourne* [1914] 2 Ch 533, CA; and see *Andrew v Aitken* (1882) 22 ChD 218. The rule that the burden of positive covenants does not run with the land is unaffected by the Law of Property Act 1925 s 79: *Rhone v Stephens* [1994] 2 AC 310, [1994] 2 All ER 65, HL.

3 *Catt v Tourle* (1869) 4 Ch App 654; *Clegg v Hands* (1890) 44 ChD 503 at 519, CA; *Manchester Ship Canal v Manchester Racecourse Co* [1901] 2 Ch 37 (covenant to give a first refusal of land); *Powell v Hemsley* [1909] 1 Ch 680 (affd [1909] 2 Ch 252, CA); *Shepherd Homes Ltd v Sandham (No 2)* [1971] 2 All ER 1267, [1971] 1 WLR 1062; *Bridges v Harrow London Borough* (1981) 260 Estates Gazette 284 at 288 (covenant to retain trees in hedgerow probably negative in substance); *Re Abbey Homesteads (Development) Ltd's Application* (1987) 53 P & CR 1, CA. A negative stipulation will not be implied unless this is essential to carry out the intention: see *Holford v Acton UDC* [1898] 2 Ch 240; cf *Price v Bouch* (1987) 53 P & CR 257.

4 *Clegg v Hands* (1890) 44 ChD 503, CA; *Shepherd Homes Ltd v Sandham (No 2)* [1971] 2 All ER 1267, [1971] 1 WLR 1062.

5 See PARA 616 et seq post. As to the protection of restrictive covenants by registration see PARA 620 post.

6 See eg *Luker v Dennis* (1877) 7 ChD 227 at 236; *Holloway Bros Ltd v Hill* [1902] 2 Ch 612 at 616-619; cf *Thornewell v Johnson* (1881) 50 LJ Ch 641 (building scheme).

7 In the leading case of *Tulk v Moxhay* (1848) 2 Ph 774 it was a purchaser's successor in title who was held bound in equity by a restrictive covenant.

8 *Parker v Whyte* (1863) 1 Hem & M 167; *Clements v Welles* (1865) LR 1 Eq 200; *Wilson v Hart* (1866) 1 Ch App 463; *Feilden v Slater* (1869) LR 7 Eq 523; *Maunsell v Hort* (1877) 1 LR Ir 88, CA; *Teape v Douse* (1905) 92 LT 319; and see *Holloway Bros Ltd v Hill* [1902] 2 Ch 612. The undertenant is not, however, liable after he has parted with possession of the premises, if he is no party to their unlawful use: *Hall v Ewin* (1887) 37 ChD 74, CA.

9 *Mander v Falcke* [1891] 2 Ch 554, CA. A person who gains a title to land by adverse possession will be bound by any restrictive covenant which is annexed to that land: *Re Nisbet and Potts' Contract* [1906] 1 Ch 386, CA.

10 *Newton Abbot Co-operative Society Ltd v Williamson and Treadgold Ltd* [1952] Ch 286, [1952] 1 All ER 279; *Earl of Leicester v Wells-next-the-Sea UDC* [1973] Ch 110, [1972] 3 All ER 77.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(ii) Restrictive Covenants and Equity/616. Nature of restrictive covenants.

## (ii) Restrictive Covenants and Equity

### 616. Nature of restrictive covenants.

Although the equitable doctrine relating to restrictive covenants was originally based on notice<sup>1</sup>, this is no longer the case<sup>2</sup>. It has become recognised that a new type of equitable interest has come into being<sup>3</sup> which, like a legal easement, gives a present interest in the land and is not obnoxious to the rule against perpetuities<sup>4</sup>, provided that it was made for the protection of other land<sup>5</sup> and that it binds the land from its inception<sup>6</sup>.

1 The doctrine as laid down in the leading case of *Tulk v Moxhay* (1848) 2 Ph 774 depended on the subsequent owner's taking with notice of the covenant. 'It is said that the covenant being one which does not run with the land, this court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased': *Tulk v Moxhay* supra at 777 per Lord Cottenham LC; cf *Luker v Dennis* (1877) 7 ChD 227; and see *Wilson v Hart* (1866) 1 Ch App 463. The doctrine applies where the vendor has imposed the restriction on himself: *Mann v Stephens* (1846) 15 Sim 377. As to other cases where it may be possible to impose a burden on a stranger to a contract see CONTRACT vol 9(1) (Reissue) PARA 754.

2 It has been said to be either an extension in equity of the doctrine in *Spencer's Case* (1583) 5 Co Rep 16a to another line of cases, or else an extension of the doctrine of negative easements: *London and South Western Rly Co v Gomm* (1882) 20 ChD 562 at 583, CA, per Jessel MR; *Formby v Barker* [1903] 2 Ch 539 at 552, CA; *LCC v Allen* [1914] 3 KB 642, CA; but see *Noakes & Co Ltd v Rice* [1902] AC 24 at 32, 35, HL. As to the distinction between easements and restrictive covenants see EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 36.

3 See *Re Nisbet and Potts' Contract* [1905] 1 Ch 391 at 396-397 per Farwell J; affd [1906] 1 Ch 386, CA.

4 *London and South Western Rly Co v Gomm* (1882) 20 ChD 562 at 583, CA; *Mackenzie v Childers* (1889) 43 ChD 265 at 279; and see *Coles v Sims* (1854) 5 De GM & G 1 at 7 per Knight-Bruce LJ.

5 *Formby v Barker* [1903] 2 Ch 539; *LCC v Allen* [1914] 3 KB 642, CA.

6 *Rogers v Hosegood* [1900] 2 Ch 388 at 405-406, CA; *Muller v Trafford* [1901] 1 Ch 54 at 61. In *Sharpe v Durrant* (1911) 55 Sol Jo 423, however, an implied covenant not to interfere with a tramway crossing to be constructed in the future was enforced against an assignee of the tramway.

In its report *Transfer of Land: Obsolete Restrictive Covenants* (Law Com No 201) the Law Commission has recommended that, save in the case of (1) covenants between landlord and tenant, unless such covenants will continue to have effect after the end of the lease term; (2) covenants imposed pursuant to statute which do not depend for their enforceability against successors in title on the person with the benefit being interested in an identifiable parcel of land; and (3) covenants to which the Lands Tribunal's jurisdiction to modify or discharge restrictions does not apply, all restrictive covenants which restrict the use of freehold land should lapse 80 years after their creation and that any such covenant which is not then obsolete should be capable of being replaced by a 'land obligation' to the like effect. It is further recommended that (a) the lapse of a restrictive covenant should take effect as a matter of law and without the parties taking action and that any register entry protecting the covenant should then be of no effect and should be cancelled on the application of anyone interested, or on the registrar's initiative; and (b) an applicant for the replacement of a restrictive covenant by a 'land obligation' should have to establish that (i) there was a valid, subsisting covenant; (ii) an identified area of land was burdened with it; (iii) by reason of his interest in particular land he was entitled to enforce the covenant; and (iv) he enjoyed practical benefits of substantial value or advantage from the covenant.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(ii) Restrictive Covenants and Equity/617. Classes of restrictive covenant.

## 617. Classes of restrictive covenant.

Covenants restricting the use of land imposed by a vendor on sale may be divided into three classes:

- 67 (1) covenants imposed for his own benefit;
- 68 (2) covenants imposed as owner of other land, of which the land sold formed a part, and intended to protect or benefit the unsold land; or
- 69 (3) covenants upon a sale of land to various purchasers who, with their respective successors in title, are intended mutually to enjoy the benefit of, and be bound by, the covenants<sup>1</sup>.

Covenants falling within head (1) above are personal to the vendor and enforceable by him alone unless expressly assigned by him; covenants falling within head (2) above are said to run with the land and are enforceable without express assignment by the owner for the time being of the land for the benefit of which they were imposed; and covenants falling within head (3) above are most usually found in sales under building schemes, but are not confined to such sales<sup>2</sup>. It is enough that the court is satisfied that it was the parties' intention that the various purchasers from a common vendor of parts of a defined area of land should have rights among themselves<sup>3</sup>. A building scheme is only a species of scheme of development, which is a more ample term<sup>4</sup>. In a case falling within head (3) above one purchaser may sue another for equitable relief by injunction without making the remaining purchasers parties<sup>5</sup>.

1 *Osborne v Bradley* [1903] 2 Ch 446 at 450; *Marquess of Zetland v Driver* [1939] Ch 1 at 7, [1938] 2 All ER 158 at 161, CA. The classes are not mutually exclusive: *Stilwell v Blackman* [1968] Ch 508 at 523, [1967] 3 All ER 514 at 519.

As to special covenants with local authorities and other bodies reserving future rights to develop land and the right of pre-emption where a tenant acquires from them the freehold or an extended lease of land under the Leasehold Reform Act 1967 see ss 29, 30, Sch 4 (as amended); and LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARAS 1456-1457, 1477-1478. Certain agreements or undertakings made or given on the passing of plans or otherwise in connection with land to which the corporation of the City of London is party are made binding upon other parties and their successors in title and persons claiming through or under them by the City of London (Various Powers) Act 1960 s 33: see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 72.

2 See the cases cited in note 1 supra.

3 See PARA 626 post.

4 'I prefer the more ample term "scheme of development" ... to the unduly narrow term "building scheme" ... "Scheme of development", I think, is the genus; "building scheme" a species': *Brunner v Greenslade* [1971] Ch 993 at 999, [1970] 3 All ER 833 at 836 per Megarry J.

5 *Western v MacDermott* (1866) 2 Ch App 72 at 76. As to the remedy by way of injunction where property is used in breach of covenant see PARA 627 post.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(ii) Restrictive Covenants and Equity/618. Persons with whom covenants are deemed to be made.

### **618. Persons with whom covenants are deemed to be made.**

A covenant relating to any land of the covenantee is deemed to be made with the covenantee and his successors in title<sup>1</sup> and with the persons deriving title under him or them, and has effect as if such successors and other persons were expressed<sup>2</sup>. Prima facie the effect of the statutory provisions relating to the benefit of covenants relating to land<sup>3</sup> is, accordingly, to annex to the land the benefit of a covenant which touches and concerns land of the covenantee; but the fact that a covenant relating to land is deemed to be made with a covenantee and his successors in title does not mean that it has the effect of annexing the benefit of the covenant in each and every case irrespective of the other express terms of the covenant. The covenant must be construed as a whole to see whether the benefit of it has been annexed<sup>4</sup>.

Unless a contrary intention is expressed, a covenant relating to any land of a covenantor or capable of being bound by him is deemed to be made by the covenantor on behalf of himself, his successors in title<sup>5</sup> and the persons deriving title under him or them, and has effect as if such successors and other persons were expressed<sup>6</sup>. A covenant entered into by a corporation restricting the use of land acquired by it does not fetter its use of the land so as to be ultra vires the corporation where the restriction does not affect the purposes for which the land was acquired<sup>7</sup>.

1 For these purposes, in connection with covenants restrictive of the user of land, 'successors in title' is deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited: Law of Property Act 1925 s 78(1).

2 Ibid s 78(1). Section 78 applies to covenants made after 31 December 1925, but the repeal of the Conveyancing Act 1881 s 58 does not affect the operation of covenants to which s 58 applied: Law of Property Act 1925 s 78(2). Section 78 does not apply in relation to new tenancies as defined by the Landlord and Tenant (Covenants) Act 1995 ss 1(3), 28(1): see s 30(4), cited in para 613 note 4 ante.

3 See ibid s 78(1): see the text and notes 1-2 supra. See *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 All ER 371, [1980] 1 WLR 594, CA; *Bridges v Harrow London Borough* (1981) 260 Estates Gazette 284 at 290. Prima facie the benefit is annexed to every part of the land unless a contrary intention clearly appears: *Federated Homes Ltd v Mill Lodge Properties Ltd* supra; *Re Herbert's Application* [1982] JPL 112, Lands Tribunal.

4 *Roake v Chadha* [1983] 3 All ER 503, [1984] 1 WLR 40.

5 For these purposes, in connection with covenants restrictive of the user of land, 'successors in title' is deemed to include the owners and occupiers for the time being of such land: Law of Property Act 1925 s 79(2).

6 Ibid s 79(1). Section 79(1) extends to a covenant to do some act relating to the land notwithstanding that the subject matter may not be in existence when the covenant is made (s 79(1)); but it applies only to covenants made after 31 December 1925 (s 79(3)). Section 79 does not apply in relation to new tenancies as defined by the Landlord and Tenant (Covenants) Act 1995 ss 1(3), 28(1): see s 30(4), cited in para 613 note 4 ante.

It is sufficient if a contrary intention can be found in the wording and the context of an instrument, without need for express provision: *Re Royal Victoria Pavilion, Ramsgate, Whelan v FTS (Great Britain) Ltd* [1961] Ch 581, [1961] 3 All ER 83; *Morrells of Oxford Ltd v Oxford United Football Club Ltd* [2001] Ch 459, 81 P & CR 152, CA. In the latter case Robert Walker LJ observed, obiter, at 471 and at 161 that where it applies the Law of Property Act 1925 s 79 'extends the number of persons whose acts or omissions are within the reach of the covenant in the sense of making equitable remedies available, provided that the other conditions for equity's intervention are satisfied.'



The provisions of s 79 appear to relate only to the form of the covenant, and do not touch the question whether the benefit and burden respectively in fact run with the land: see *Grant v Edmondson* [1930] 2 Ch 245; affd [1931] 1 Ch 1, CA; *Cator v Newton and Bates* [1940] 1 KB 415, [1939] 4 All ER 457, CA; *Tophams Ltd v Earl of Sefton* [1967] 1 AC 50 at 81, [1966] 1 All ER 1039 at 1053, HL, per Lord Wilberforce.

The Law of Property Act 1925 s 79 does not affect the rule that the burden of a positive covenant does not run with the land: *Rhone v Stephens* [1994] 2 AC 310, [1994] 2 All ER 65, HL.

Similarly, the fact that it is provided by the Law of Property Act 1925 s 56(1) that a person not named as party to a conveyance or other instrument may take the benefit of any covenant over or respecting land or other property does not affect the law relating to covenants running with the land, to which covenants only this provision relates: *Dyson v Forster* [1909] AC 98, HL; *Grant v Edmondson* supra; *Re Ecclesiastical Comrs for England's Conveyance* [1936] Ch 430; *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL; *Wiles v Banks* (1983) 50 P & CR 80; affd (1984) 50 P & CR 80 at 86, CA. See also *White v Bijou Mansions Ltd* [1937] Ch 610, [1937] 3 All ER 269; affd [1938] Ch 351, [1938] 1 All ER 546, CA; *Re Foster, Hudson v Foster* [1938] 3 All ER 357 at 365 per Crossman J; *Stromdale & Ball Ltd v Burden* [1952] Ch 223, [1952] 1 All ER 59; *Drive Yourself Hire Co (London) Ltd v Strutt* [1954] 1 QB 250, [1953] 2 All ER 1475, CA; *Lysus v Prowsa Developments Ltd* [1982] 2 All ER 953 at 958, [1982] 1 WLR 1044 at 1049 per Dillon J; *Amsprop Trading Ltd v Harris Distribution Ltd* [1997] 2 All ER 990, [1997] 1 All ER 1025.

7 *Earl of Leicester v Wells-next-the-Sea UDC* [1973] Ch 110, [1972] 3 All ER 77. As to the ultra vires doctrine (whose effect on relations between a company and third parties is largely abolished by the Companies Act 1985 ss 35-35B (as substituted) see PARA 774 text and note 5 post; and COMPANIES vol 14 (2009) PARA 263.

## UPDATE

### 618 Persons with whom covenants are deemed to be made

NOTE 4--*Roake*, cited, applied: *Crest Nicholson Residential (South) Ltd v McAllister* [2004] EWCA Civ 410, [2004] 2 All ER 991n. See also *Norwich City College of Further and Higher Education v McQuillin* [2009] EWHC 1496 (Ch), [2009] 2 P & CR 411, [2009] All ER (D) 300 (Jun) (covenants made only for benefit of owners and successors in title to large estate, so purchasers of parcels of land sold off from estate not entitled to benefit of covenants).

NOTE 6--See *City Inn (Jersey) Ltd v Ten Trinity Square Ltd* [2008] EWCA Civ 156, [2008] All ER (D) 76 (Mar).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(ii) Restrictive Covenants and Equity/619. Effect of devolution of the land.

### **619. Effect of devolution of the land.**

Every covenant<sup>1</sup> running with the land<sup>2</sup> takes effect in accordance with any statutory enactment affecting the devolution of the land; and accordingly the benefit or burden of every such covenant vests in or binds the persons who by virtue of any such enactment or otherwise succeed to the title of the covenantee or the covenantor, as the case may be<sup>3</sup>.

1     Ie whether entered into before 1 January 1926 or after 31 December 1925.

2     For these purposes, a covenant runs with the land when the benefit or burden of it, whether at law or in equity, passes to the successors in title of the covenantee or the covenantor, as the case may be: Law of Property Act 1925 s 80(4). As to the position of a beneficiary under a trust whose trustees are bare trustees of the benefit of a restrictive covenant see PARA 615 ante; and as to the devolution of real estate upon personal representatives see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 363 et seq.

3     Ibid s 80(2).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(ii) Restrictive Covenants and Equity/620. Liability and notice.

## 620. Liability and notice.

In accordance with the maxim 'he who is first has the stronger right'<sup>1</sup>, a restrictive covenant binds subsequent equitable owners, whether they take with notice of it or not; and it binds also a subsequent legal owner unless he obtained the legal estate for value<sup>2</sup> and without notice<sup>3</sup> or from a person who purchased it without notice<sup>4</sup>. An undertenant is affected with constructive notice of the covenants contained in the head lease, since it is his duty to inquire into his landlord's title<sup>5</sup>.

The benefit of any covenant or agreement restrictive of the user of land is excepted from the overreaching consequences of a conveyance under a subsequent trust of land<sup>6</sup>.

Where land is subject to a burden which runs with it for the benefit of other land, a purchaser taking under compulsory powers takes the land subject to that burden, but the covenant cannot be enforced by injunction if it is attributable to the execution of the works authorised by the statute under which it was taken, or to the exercise of the statutory powers thereby conferred on the purchaser<sup>7</sup>. Similarly, where a statutory undertaker has acquired by agreement, rather than under compulsory process, property for the purposes of its statutory undertaking, persons entitled to the benefit of restrictive covenants affecting the land cannot assert those covenants in order to prevent the use of the land for statutory purposes, although the acquisition itself does not discharge the restrictive covenants<sup>8</sup>.

A restrictive covenant, not being a covenant between landlord and tenant<sup>9</sup>, entered into after 31 December 1925 is registrable as a land charge<sup>10</sup>. If the covenant has not been registered before the subsequent purchaser of a legal estate in the land for money or money's worth completes his purchase, it is void against him<sup>11</sup>. In the case of registered land a person who claims to be entitled to the benefit of a restrictive covenant<sup>12</sup> may apply to the registrar for the entry in the register of a notice in respect of the restrictive covenant<sup>13</sup>. The effect of a notice is to protect the priority of the interest entered in the register<sup>14</sup>.

1 *le qui prior est tempore, potior est jure*: see PARA 568 ante.

2 A restrictive covenant is enforceable against a squatter since he is not a purchaser for value: *Re Nisbet and Pott's Contract* [1906] 1 Ch 386, CA. As to the meaning of 'value' see PARA 565 ante.

3 *London and South Western Rly Co v Gomm* (1882) 20 ChD 562 at 583, CA; *Rogers v Hosegood* [1900] 2 Ch 388 at 405, CA; *Osborne v Bradley* [1903] 2 Ch 446 at 451; *Re Nisbet and Pott's Contract* [1906] 1 Ch 386, CA; *Long v Gray* (1913) 58 Sol Jo 46, CA; cf *Averall v Wade* (1835) L & G temp Sugd 252 at 260. As to notice see *Rowell v Satchell* [1903] 2 Ch 212. A purchaser will be bound by the covenants if he has notice before the completion of his contract, and hence he can refuse to complete on the ground of there being covenants affecting the property of which he did not have notice before the contract: *Reeve v Berridge* (1888) 20 QBD 523, CA; *Re White and Smith's Contract* [1896] 1 Ch 637; *Molyneux v Hawtrey* [1903] 2 KB 487, CA. See also *Mander v Falcke* [1891] 2 Ch 554, CA (mere occupier bound). Where there is no continuing breach, a covenantor who has been no party to the breach is not bound to make the breach good: *Powell v Hemsley* [1909] 2 Ch 252, CA; distinguished in *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 2 All ER 321 at 338, [1974] 1 WLR 798 at 811-812 (a once-for-all breach lasted during the whole period of development and subsequent purchasers who contracted with the developers during that period aided and abetted the breach). As to registration see the text to notes 9-14 infra.

4 *Wilkes v Spooner* [1911] 2 KB 473, CA.

5 *Parker v Whyte* (1863) 1 Hem & M 167; *Feilden v Slater* (1869) LR 7 Eq 523; *Herbert v Maclean* (1860) 12 L Ch R 84; and see *Thornwell v Johnson* (1881) 50 LJ Ch 641; *Holloway Bros Ltd v Hill* [1902] 2 Ch 612; *Abbey v Gutters* (1911) 55 Sol Jo 364. The omission to inquire does not, however, affect the undertenant with notice if in fact the inquiry would not have disclosed the covenant in question: *Carter v Williams* (1870) LR 9 Eq 678. A head landlord who accepts a surrender of the head lease will be bound by covenants entered into by the underlandlord with the undertenant, of which the head landlord has actual or constructive notice: *Phipps v Callegari* (1910) 54 Sol Jo 635.

6 Law of Property Act 1925 s 2(3)(ii). The overreaching provisions referred to are those contained in s 2(2) (as amended): see REAL PROPERTY vol 39(2) (Reissue) PARA 249.

7 *Manchester, Sheffield and Lincolnshire Ry Co v Anderson* [1898] 2 Ch 394, CA; *Re Simeon and Isle of Wight RDC* [1937] Ch 525 at 535, [1937] 3 All ER 149 at 153; *Marten v Flight Refuelling Ltd* [1962] Ch 115 at 140-141, [1961] 2 All ER 696 at 708-709; *Thames Water Utilities Ltd v Oxford City Council* [1999] 1 EGLR 167, [1998] 31 LS Gaz R 37.

8 *Kirby v Harrogate School Board* [1896] 1 Ch 437, CA; *Long Eaton Recreation Grounds Co Ltd v Midland Ry Co* [1902] 2 KB 574, CA; *Re 6, 8, 10 and 12 Elm Avenue New Milton, ex p New Forest District Council* [1984] 3 All ER 632, [1984] 1 WLR 1398; *Brown v Heathlands Mental Health NHS Trust* [1996] 1 All ER 133, applied in *Greenwich Healthcare NHS Trust v London and Quadrant Housing Trust* [1998] 3 All ER 437, [1998] 1 WLR 1749; and see *Cadogan v Royal Brompton Hospital National Health Trust* [1996] 2 EGLR 115, [1996] 37 EG 142. Compensation may, however, be payable under the Compulsory Purchase Act 1965 s 10(2): see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARAS 877, 878.

9 See *Newman v Real Estate Debenture Corpn Ltd and Flower Decorations Ltd* [1940] 1 All ER 131; *Dartstone Ltd v Cleveland Petroleum Co Ltd* [1969] 3 All ER 668, [1969] 1 WLR 1807.

10 Ie under the Land Charges Act 1972 s 2(5), Class D(ii): see LAND CHARGES. As to the effects of such registration on a purchaser see PARA 577 ante.

11 See *ibid* s 4(6) (as amended); and LAND CHARGES.

12 Ie not being a restrictive covenant made between a lessor and lessee, so far as relating to the demised premises: Land Registration Act 2002 ss 33(c), 34(1).

13 *Ibid* s 34(1).

14 *Ibid* s 29(2)(a)(i). See further LAND REGISTRATION.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(ii) Restrictive Covenants and Equity/621. Retention of land capable of being benefited.

## **621. Retention of land capable of being benefited.**

In the absence of a scheme of development, although the restrictive covenant binds the covenantor's successors in title, it may be that there is in fact no one who can enforce it against them<sup>1</sup>. A covenant taken by a vendor who retains no land which can be benefited by it is personal only, and hence, where the vendor has parted with the whole of his land in the neighbourhood, the covenant, while it is enforceable by the vendor and his personal representatives against the purchaser and his personal representatives, is not enforceable against a subsequent purchaser<sup>2</sup>. Moreover, the covenant must touch and concern<sup>3</sup> the dominant land if it is to bind subsequent purchasers. Where the fee simple in the benefited land and in the burdened land becomes vested in one person, restrictive covenants on the burdened land are extinguished unless the common owner recreates them on a subsequent sale of the benefited land<sup>4</sup>.

The interest of a landlord in the reversion is sufficient to enable him to sue an undertenant on a restrictive covenant contained in the lease<sup>5</sup>; and the interest of a mortgagee in the land the subject matter of the charge likewise suffices<sup>6</sup>.

Certain bodies have been given statutory powers to enforce restrictive covenants entered into by them with persons interested in land against their successors in title, although such bodies may have no land capable of being benefited by them<sup>7</sup>.

A public decision-maker may only use a statutory power conferred upon him or it to further the policy and objects of the relevant Act<sup>8</sup>. Thus the ordinary incidents of a sale under the right-to-buy provisions<sup>9</sup> do not include any reservation of a right in the seller to keep the profits of any enhanced value arising from any potential development<sup>10</sup>.

1 See *Re Sunnyfield* [1932] 1 Ch 79; *Re Freeman-Thomas Indenture, Eastbourne Corp'n v Tilley* [1957] 1 All ER 532, [1957] 1 WLR 560 (the estate for the benefit of which the covenant had been taken had ceased to exist); *Dano Ltd v Earl of Cadogan* [2003] EWCA Civ 782, [2003] 27 LS Gaz R 36, [2003] All ER (D) 240 (May).

2 *Formby v Barker* [1903] 2 Ch 539, CA; *Millbourn v Lyons* [1914] 1 Ch 34; affd [1914] 2 Ch 231, CA; *LCC v Allen* [1914] 3 KB 642, CA; *Chambers v Randall* [1923] 1 Ch 149; *Kelly v Barrett* [1924] 2 Ch 379, CA; *Re Union of London and Smith's Bank Ltd's Conveyance, Miles v Easter* [1933] Ch 611 at 630, CA.

3 See PARA 613 note 5 ante.

4 *Re Tiltwood, Sussex, Barrett v Bond* [1978] Ch 269, [1978] 2 All ER 1091; following the dictum of Lord Cross in *Texaco Antilles Ltd v Kernochan* [1973] AC 609 at 626, [1973] 2 All ER 118 at 127, PC ('if restrictive covenants exist simply for the mutual benefit of two adjoining properties and both those properties are bought by one person, the covenants will automatically come to an end and will not revive on a subsequent severance unless the common owner then recreates them'). Different considerations apply, however, where the restrictive covenant arises under a building scheme: see PARA 625 post.

5 *Hall v Ewin* (1887) 37 ChD 74, CA; *Regent Oil Co Ltd v JA Gregory (Hatch End) Ltd* [1966] Ch 402 at 432-433, [1965] 3 All ER 673 at 680, CA, per Harman LJ.

6 *John Bros Abergaw Brewery Co v Holmes* [1900] 1 Ch 188; *Regent Oil Co Ltd v JA Gregory (Hatch End) Ltd* [1966] Ch 402 at 433, [1965] 3 All ER 673 at 680, CA, per Harman LJ.

7 Thus, local housing authorities now have such power (see the Housing Act 1985 s 609; *Re Beech's Application* (1990) 59 P & CR 502, Lands Tribunal; and HOUSING vol 22 (2006 Reissue) PARA 64), as have local planning authorities (see the Town and Country Planning Act 1990 s 106(3) (as substituted) and TOWN AND

COUNTRY PLANNING vol 46(1) (Reissue) PARA 245). The National Trust has a similar power: see the National Trust Act 1937 s 8; and NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 994. Covenants entered into with the National Trust may subsequently be modified unless the National Trust shows proper grounds for requiring their enforcement: *Gee v National Trust for Places of Historic Interest or Natural Beauty* [1966] 1 All ER 954, [1966] 1 WLR 170, CA.

For other cases of a similar statutory power see eg the Green Belt (London and Home Counties) Act 1938 s 22; and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 938; the Highways Act 1980 s 87 (as amended); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 520. See also *Peabody Donation Fund Governors v London Residuary Body* (1987) 55 P & CR 355n; on appeal (1988) 56 P & CR 154n (decided on the Artisans and Labourers Dwellings Improvement Act 1875 s 9 (repealed)).

8 *Padfield v Ministry of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 1 All ER 694, HL.

9 See the Housing Act 1985 ss 127, 139 (as amended), s 151 (as substituted), Sch 6 para 6; and LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1851 et seq.

10 *R v Braintree District Council, ex p Halls* (2000) 80 P & CR 266, [2000] 3 EGLR 19, CA.

## UPDATE

### 621 Retention of land capable of being benefited

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(ii) Restrictive Covenants and Equity/622. Annexation of covenant to retained land.

## 622. Annexation of covenant to retained land.

Where a vendor retains land which is sufficiently defined<sup>1</sup> and which is capable of being benefited by the covenant at the time when it is imposed<sup>2</sup>, and the covenant is expressed to be for the benefit of that land and every part of it<sup>3</sup>, then the benefit of the covenant is annexed to the land and passes on a subsequent conveyance of it or any part of it without express mention, even though the purchaser is not aware of the existence of the covenant<sup>4</sup>. The intention that the covenant should enure for the benefit of the retained land must be manifested in the conveyance in which the covenant was contained when construed in the light of the surrounding circumstances, including any necessary implication in the conveyance from those surrounding circumstances<sup>5</sup>. There may also be statutory annexation under the Law of Property Act 1925<sup>6</sup>. A restrictive covenant constitutes an equitable interest in the land and passes, not on the ground that a subsequent purchaser has expressly bought it<sup>7</sup>, but because it inheres in, or is annexed to, the land which he has bought<sup>8</sup>. Moreover, although the covenant is not taken for the benefit of the defined land 'or any part thereof', the benefit will pass on an assurance of part, if the conveyance shows an intention that the covenant should be annexed to each part of the land<sup>9</sup>.

Where the vendor imposes a covenant on the land which he sells, it may be assumed that the covenant is capable of benefiting the land which he retains<sup>10</sup>, and the covenant may continue to benefit the retained land so long as the owner of it reasonably believes that it is capable of doing so<sup>11</sup>. The retained land may be capable of benefiting from the covenant whatever may be its area or the area of the land sold<sup>12</sup>.

1 *Marquess of Zetland v Driver* [1939] Ch 1, [1938] 2 All ER 158, CA; *Re Heywood's Conveyance, Cheshire Lines Committee v Liverpool Corp'n* [1938] 2 All ER 230 at 234; *Newton Abbot Co-operative Society Ltd v Williamson and Treadgold Ltd* [1952] Ch 286 at 289, [1952] 1 All ER 279 at 283 per Upjohn J; *Re Selwyn's Conveyance, Hayman v Soole* [1967] Ch 674, [1967] 1 All ER 339 (where 'neighbouring land part of or lately part of the Selwyn estate' was prima facie ascertained or ascertainable).

2 *Marquess of Zetland v Driver* [1939] Ch 1, [1938] 2 All ER 158, CA.

3 Whether or not the benefit is annexed to each and every part of the retained land is a question of construction. Appropriate words of annexation to each and every part are that the covenant is with the vendors and their successors in title 'or other the owner or owners for the time being [of the defined land] or any part or parts thereof': *Re Union of London and Smith's Bank Ltd's Conveyance, Miles v Easter* [1933] Ch 611, CA; *Marquess of Zetland v Driver* [1939] Ch 1, [1938] 2 All ER 158, CA. If the language of the covenant shows an intention to annex the benefit to the whole of the land of the covenantee, there will be no effective annexation if the area is greater than can reasonably be benefited: *Re Ballard's Conveyance* [1937] Ch 473, [1937] 2 All ER 691. In *Drake v Gray* [1936] Ch 451, [1936] 1 All ER 363, CA, where the covenant was expressed to be with the respective parties 'and other the owners or owner for the time being of the remaining hereditaments so agreed to be partitioned as aforesaid', the covenant was held operative as to every part of the land. See also *Russell v Archdale* [1964] Ch 38, [1962] 2 All ER 305; *Re Jeffs' Transfer, Rogers v Astley (No 2)* [1966] 1 All ER 937, [1966] 1 WLR 841; *Re Selwyn's Conveyance, Hayman v Soole* [1967] Ch 674, [1967] 1 All ER 339; *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798; *Jamaica Mutual Life Assurance Society v Hillsborough Ltd* [1989] 1 WLR 1101, PC. The earlier cases need to be considered in the light of *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 All ER 371, [1980] 1 WLR 594, CA (where the court favoured the view that the benefit is prima facie annexed to every part of the land unless a contrary intention appears).

4 *Rogers v Hosegood* [1900] 2 Ch 388, CA (where the covenant was expressed to be for the benefit of the vendors, their heirs and assigns and others claiming under them all or any of the vendors' land adjoining or

near to the premises conveyed; under these words the benefit of the covenant was annexed to all the adjoining or neighbouring land retained, and hence it passed on a subsequent conveyance of part of it); *Lawrence v South County Freeholds Ltd* [1939] Ch 656 at 680, [1939] 2 All ER 503 at 523 per Simonds J; *R v Westminster City Council and London Electricity Board, ex p Leicester Square Coventry Street Association Ltd* (1989) 59 P & CR 51. Where the covenant is to be annexed to part only of the land, that part must be sufficiently defined: *Renals v Cowlshaw* (1879) 11 ChD 866 at 868, CA; *Newton Abbot Co-operative Society Ltd v Williamson and Treadgold Ltd* [1952] Ch 286 at 289, [1952] 1 All ER 279 at 283; and see *Ives v Brown* [1919] 2 Ch 314 at 322 (where the land retained was not sufficiently described for the covenant to be annexed to it); *Whatman v Gibson* (1838) 9 Sim 196; *Child v Douglas* (1854) Kay 560 at 572; on appeal 5 De GM & G 739. The benefit of a restrictive covenant may be annexed to the soil of a road, but the owner ceases to have such an interest in the road as will entitle him to enforce the covenant after the road has been taken over by the local authority: *Kelly v Barrett* [1924] 2 Ch 379, CA. The annexation usually takes place at the time of the original conveyance, and may result either from the express words of that conveyance (see *Rogers v Hosegood* supra) or from the circumstances attending it (*Rogers v Hosegood* supra at 408; *Marten v Flight Refuelling Ltd* [1962] Ch 115, [1961] 2 All ER 696); or it may be the result of some subsequent instrument executed by the vendor. It is sufficient if the benefit of the covenant has been annexed to the land at the date of the later conveyance: *Reid v Bickerstaff* [1909] 2 Ch 305 at 320, CA, per Cozens-Hardy MR.

5 *Shropshire County Council v Edwards* (1982) 46 P & CR 270; *J Sainsbury plc v Enfield London Borough Council* [1989] 2 All ER 817, [1989] 1 WLR 590; *Re MCA East Ltd* [2002] EWHC 1684 (Ch), [2003] 1 P & CR 118, [2002] All ER (D) 396 (Jul); but see *Marten v Flight Refuelling Ltd* [1962] Ch 115, [1961] 2 All ER 696.

6 le by virtue of the Law of Property Act 1925 s 78: see PARA 618 ante. See also *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 All ER 371, [1980] 1 WLR 594, CA.

7 *Rogers v Hosegood* [1900] 2 Ch 388 at 407, CA.

8 It does not, however, run if the terms or circumstances of the second conveyance show that the benefit of the covenant was not to pass: see *Rogers v Hosegood* [1900] 2 Ch 388 at 408, CA. It is a question of construction whether or not express assignment is excluded by annexation: *Stilwell v Blackman* [1968] Ch 508 at 525-527, [1967] 3 All ER 514 at 520-521.

9 *Drake v Gray* [1936] Ch 451, [1936] 1 All ER 363, CA; and see *Stilwell v Blackman* [1968] Ch 508, [1967] 3 All ER 514 (express assignment of benefit to a purchaser of part of the land); *Griffiths v Band* (1974) 29 P & CR 243; *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 All ER 371, [1980] 1 WLR 594, CA.

10 *Lord Northbourne v Johnston & Son* [1922] 2 Ch 309; *Marten v Flight Refuelling Ltd* [1962] Ch 115, [1961] 2 All ER 696; *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798; *Cryer v Scott Bros (Sunbury) Ltd* (1988) 55 P & CR 183, CA.

11 *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798.

12 *Marten v Flight Refuelling Ltd* [1962] Ch 115, [1961] 2 All ER 696; *Re Gadd's Land Transfer, Cornmill Developments Ltd v Bridle Lane (Estates) Ltd* [1966] Ch 56, [1965] 2 All ER 800; *Earl of Leicester v Wells-next-the-Sea UDC* [1973] Ch 110, [1972] 3 All ER 77.

## UPDATE

### 622 Annexation of covenant to retained land

NOTE 4--See *Crest Nicholson Residential (South) Ltd v McAllister* [2004] EWCA Civ 410, [2004] 2 All ER 991n.

NOTE 6--See *Sims v Mahon* [2005] All ER (D) 169 (Jun).



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(ii) Restrictive Covenants and Equity/623. Assignment where covenant not annexed to retained land.

## 623. Assignment where covenant not annexed to retained land.

Where land capable of being benefited by the covenant<sup>1</sup> is retained by the covenantee but the benefit of the covenant is not annexed to the land, it is assumed that he has taken the covenant in order to enable him to dispose of the retained land to the best advantage, and accordingly he is permitted to assign the benefit on subsequent sales of the land or parts of it so as to enable the purchaser to enforce the covenant against the covenantors' assigns taking with notice<sup>2</sup>; but this is subject to the condition that the land which the covenant was to benefit and which is to be conveyed must be ascertainable<sup>3</sup> or certain<sup>4</sup>; and the covenantee can dispose of the covenant only with the land. It is not clear whether the express assignment of the benefit of a restrictive covenant operates to annex it to the land<sup>5</sup>. There may be an assignment by a person other than the original covenantee in whom both the land and the benefit of the covenant have become vested<sup>6</sup>. When the covenantee has parted with the whole of the land which he retained, he cannot afterwards assign the benefit of the covenant<sup>7</sup>.

There seems to be no reason why a third party who can bring himself within its provisions should not be able to bring a claim under the Contracts (Rights of Third Parties) Act 1999<sup>8</sup> in respect of the benefit of a valid restrictive covenant, but there is nothing in that Act to affect the established rules as to the running of the burden<sup>9</sup>.

1 See PARAS 621-622 ante.

2 For a person claiming by express assignment to obtain the benefit of a covenant, it must appear that the benefit of the covenant was part of the subject matter of the purchase: *Renals v Cowlshaw* (1878) 9 ChD 125 at 130; affd (1879) 11 ChD 866, CA; *Re Union of London and Smith's Bank Ltd's Conveyance, Miles v Easter* [1933] Ch 611, CA; *Re Jeffs' Transfer, Rogers v Astley (No 2)* [1966] 1 All ER 937, [1966] 1 WLR 841. Unless otherwise indicated in the instrument creating the covenant, annexation of the benefit of a covenant to the land does not exclude express assignment of the benefit: *Stilwell v Blackman* [1968] Ch 508, [1967] 3 All ER 514. In *Jamaica Mutual Life Assurance Society v Hillsborough Ltd* [1989] 1 WLR 1101, PC, no assignment was established.

3 The land may be ascertained by evidence extrinsic to the instrument creating the covenant: *Newton Abbott Co-operative Society Ltd v Williamson and Treadgold Ltd* [1952] Ch 286, [1952] 1 All ER 279.

4 *Newton Abbott Co-operative Society Ltd v Williamson and Treadgold Ltd* [1952] Ch 286, [1952] 1 All ER 279; and see *Keates v Lyon* (1869) 4 Ch App 218; *Renals v Cowlshaw* (1878) 9 ChD 125 at 130 (affd (1879) 11 ChD 866, CA); *Rogers v Hosegood* [1900] 2 Ch 388 at 407, CA; *Reid v Bickerstaff* [1909] 2 Ch 305 at 320, CA; *Re Union of London and Smith's Bank Ltd's Conveyance, Miles v Easter* [1933] Ch 611 at 631, CA. The existence and situation of the land to be benefited need not be indicated in the conveyance, provided that it can be shown with reasonable certainty; and the natural meaning of 'reasonable certainty' is (1) that the existence and situation of the land may be so shown by evidence outside the deed; and (2) that a broad and reasonable view may be taken as to the proof of the identity of the land: *Marten v Flight Refuelling Ltd* [1962] Ch 115 at 131, [1961] 2 All ER 696 at 703.

5 In favour of the proposition are dicta in *Renals v Cowlshaw* (1878) 9 ChD 125 at 130, 131 per Hall V-C (affd (1879) 11 ChD 866, CA); *Rogers v Hosegood* [1900] 2 Ch 388 at 408, CA, per Collins LJ; *Reid v Bickerstaff* [1909] 2 Ch 305 at 320, CA, per Cozens-Hardy MR, at 326 per Buckley LJ and at 328 per Kennedy LJ; contra *Re Pinewood Estate, Farnborough* [1958] Ch 280, [1957] 2 All ER 517; *Stilwell v Blackman* [1968] Ch 508, [1967] 3 All ER 514; *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 All ER 371 at 378, [1980] 1 WLR 594 at 603, CA (citing the judgment of John Mills QC at first instance). See also (1968) 84 LQR 29.

6 *Newton Abbott Co-operative Society Ltd v Williamson and Treadgold Ltd* [1952] Ch 286, [1952] 1 All ER 279; *Earl of Leicester v Wells next-the-Sea UDC* [1973] Ch 110, [1972] 3 All ER 77.

7 *Chambers v Randall* [1923] 1 Ch 149; *Re Union of London and Smith's Bank Ltd's Conveyance, Miles v Easter* [1933] Ch 611, CA; and see *Re Rutherford's Conveyance, Goadby v Bartlett* [1938] Ch 396, [1938] 1 All ER 495; *Re Distributors and Warehousing Ltd* [1986] BCLC 129; *Coronation Street Industrial Properties Ltd v Ingall Industries plc* (1988) 56 P & CR 348, CA. See also *Ives v Brown* [1919] 2 Ch 314 (devise of residue held not to carry by operation of law the benefit of restrictive covenants); *Lord Northbourne v Johnston & Son* [1922] 2 Ch 309 (assignment of benefit of covenants to a beneficiary by trustees); both explained in *Re Union of London and Smith's Bank Ltd's Conveyance, Miles v Easter* supra at 633-634.

8 See the Contracts (Rights of Third Parties) Act 1999 s 1; para 609 the text and notes 10-11 ante; para 614 the text and note 10 ante; and CONTRACT.

9 See PARA 614 ante. It will seldom be necessary to rely on the Contracts (Rights of Third Parties) Act 1999 in view of the provisions in the Law of Property Act 1925 s 78 considered in para 618 ante.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(iii) Schemes of Development/624. Essentials of a building scheme.

### **(iii) Schemes of Development**

#### **624. Essentials of a building scheme.**

A building scheme is a common species of the genus described as 'schemes of development'<sup>1</sup>. In order to establish a building scheme the traditional requirements are:

- 70 (1) that there was a common vendor under whom the various owners derive title;
- 71 (2) that, before land was sold, there was a scheme relating to a defined area which the vendor intended to sell in lots, containing restrictions which were to be imposed on all the lots and which, though varying in details as to particular lots, were consistent only with some general development;
- 72 (3) that the restrictions were intended by the vendor to be, and were, for the benefit of all the lots;
- 73 (4) that the parties or their predecessors in title purchased their lots from the common vendor on the footing that the restrictions imposed on the land purchased by them<sup>2</sup> were to enure for the benefit of the other lots included in the general scheme<sup>3</sup>.

The more recent cases suggest that the above requirements need not be strictly complied with where there is proof of a common intention that the restrictive covenants were to be mutually enforceable in the interests of the purchasers and their successors<sup>4</sup>.

For the requirement in head (2) above to be satisfied it is essential that both the area within which the scheme is to operate and the obligations imposed within the area should be definite, so that each party may know with certainty what his rights and obligations are, and against whom and by whom those rights and obligations may be enforced; but the obligation need not be identical in every instance<sup>5</sup>. It is not, however, necessary that all the lots should be defined when the scheme is established<sup>6</sup>.

The intention required to satisfy the requirement in head (3) above is to be gathered, generally speaking, from a consideration of all the circumstances, including the nature of the restrictions<sup>7</sup>. It is not negatived by the fact that the vendor reserves to himself power to dispense with the restrictions as regards lots which are not sold<sup>8</sup>. Apart from the exercise of any such power, the vendor himself is bound by the scheme<sup>9</sup>. A provision that the restrictions imposed on the purchaser shall not be binding on the vendor and that the vendor shall be entitled to vary them is not, however, inconsistent with the existence of a building scheme<sup>10</sup>. Where an estate has been fully developed and the original vendors are no longer on the scene and have no retained land, and there is no-one to answer the description of the vendors or their successors, any dispensing power reserved by the original vendors has gone. The restrictions remain unmitigated by any dispensing power<sup>11</sup>.

If the requirements in heads (1) to (3) above are established, the requirement in head (4) above will readily be inferred, provided that the purchasers have notice of the facts involved in the requirements in heads (1) to (3) above. Without such notice, however, it is difficult to establish the requirement in head (4) above<sup>12</sup>.

1 See PARA 617 the text and note 4 ante, para 626 post.

2 There is no requirement that they purchased on the footing that any restrictions subject to which others purchased were to enure for the benefit of their own lots: *Eagling v Gardner*[1970] 2 All ER 838 at 846.

3 See *Elliston v Reacher*[1908] 2 Ch 374 at 384 per Parker J (affd [1908] 2 Ch 665, CA); *Reid v Bickerstaff*[1909] 2 Ch 305 at 319, CA, per Cozens-Hardy MR; *Eagling v Gardner*[1970] 2 All ER 838. The principle applies where a building is let out in flats: *Spicer v Martin*(1888) 14 App Cas 12, HL; *Hudson v Cripps*[1896] 1 Ch 265; *Newman v Real Estate Debenture Corpn Ltd and Flower Decorations Ltd*[1940] 1 All ER 131; cf *Browne v Flower*[1911] 1 Ch 219. In the following cases building schemes were found to exist: *Child v Douglas* (1854) Kay 560 (on appeal 5 De GM & G 739); *Brown v Inskip* (1884) Cab & El 231; *Tindall v Castle* (1893) 62 LJ Ch 555; *Nalder and Collyer's Brewery Co Ltd v Harman* (1900) 83 LT 257, CA; *Coles v Sims* (1853) Kay 56 (on appeal (1854) 5 De GM & G 1); *Western v MacDermott*(1866) 2 Ch App 72. In the following cases building schemes were found not to exist: *Keates v Lyon*(1869) 4 Ch App 218; *Tucker v Vowles*[1893] 1 Ch 195; *Davis v Leicester Corpn*[1894] 2 Ch 208, CA; *Osborne v Bradley*[1903] 2 Ch 446; *Kelly v Barrett*[1924] 2 Ch 379, CA; *Re Wembley Park Estate Co Ltd's Transfer, London Sephardi Trust v Baker*[1968] Ch 491, [1968] 1 All ER 457; *Lund v Taylor* (1975) 31 P & CR 167, CA (prospective purchasers not informed that covenants imposed on all purchasers); *Harlow v Hartog* (1977) 245 Estates Gazette 140; *Kingsbury v LW Anderson Ltd* (1979) 40 P & CR 136 (variations between covenants; need for reciprocity of obligations stressed); *Emile Elias & Co Ltd v Pine Groves* [1993] 1 WLR 305, 66 P & CR 1, PC; and see *Ashby v Wilson*[1900] 1 Ch 66 (the letting of a row of shops for different businesses appears not to have constituted a building scheme).

4 *Baxter v Four Oaks Properties Ltd*[1965] Ch 816, [1965] 1 All ER 906 (no lotting); *Re Dolphin's Conveyance, Birmingham Corpn v Boden*[1970] Ch 654, [1970] 2 All ER 664 (no common vendor; no lotting); both distinguished in *Lund v Taylor* (1975) 31 P & CR 167, CA (where the court stressed the need for the creation of reciprocal rights and obligations). The traditional requirements were satisfied in *Eagling v Gardner*[1970] 2 All ER 838. See also *Re Crest Homes plc's Application* (1984) 48 P & CR 309, Lands Tribunal.

5 *Reid v Bickerstaff*[1909] 2 Ch 305 at 319, CA; *Renals v Cowlshaw*(1879) 11 ChD 866 at 868, CA; *Osborne v Bradley*[1903] 2 Ch 446 at 453; *Torbay Hotel Ltd v Jenkins*[1927] 2 Ch 225; *Lawrence v South County Freeholds Ltd*[1939] Ch 656, [1939] 2 All ER 503; *Re Wembley Park Estate Co Ltd's Transfer, London Sephardi Trust v Baker*[1968] Ch 491, [1968] 1 All ER 457.

6 *Baxter v Four Oaks Properties Ltd*[1965] Ch 816, [1965] 1 All ER 906; but see *Lund v Taylor* (1976) 31 P & CR 167, CA.

7 *Elliston v Reacher*[1908] 2 Ch 374 at 384; affd but not expressly on this point [1908] 2 Ch 665, CA.

8 See *Osborne v Bradley*[1903] 2 Ch 446 at 454; *Elliston v Reacher*[1908] 2 Ch 665 at 672, CA; *Whitehouse v Hugh*[1906] 2 Ch 283, CA; *Mayner v Payne*[1914] 2 Ch 555. A dispensing power is, however, a matter for consideration in determining whether the scheme is or is not intended to be for the benefit of the lots offered for sale (*Elliston v Reacher* supra at 672, 674), but it is of no great weight (*Re Wembley Park Estate Co Ltd's Transfer, London Sephardi Trust v Baker*[1968] Ch 491 at 498-499, [1968] 1 All ER 457 at 460-461). See also *A-G and London Property Investment Trust Ltd v Richmond Corpn and Gosling & Sons* (1903) 89 LT 700 (vendor reserved the right to dispense with the restrictions both as regards land not sold and, with the purchaser's consent, as regards any land sold).

9 *Mackenzie v Childers*(1889) 43 ChD 265; *Re Birmingham and District Land Co and Allday*[1893] 1 Ch 342; cf *Whitehouse v Hugh*[1906] 2 Ch 283, CA.

10 *Re 6, 8, 10 and 12 Elm Avenue, New Milton, ex p New Forest District Council*[1984] 3 All ER 632, [1984] 1 WLR 1398.

11 *Re Beechwood Homes Ltd's Application*[1994] 2 EGLR 178, [1994] 28 EG 128, CA; *Briggs v McCusker*[1996] 2 EGLR 197.

12 *Elliston v Reacher*[1908] 2 Ch 374 at 385; affd but not expressly on this point [1908] 2 Ch 665, CA. See also *Jamaica Mutual Life Assurance Society v Hillsborough Ltd* [1989] 1 WLR 1101, PC (non-existence of building scheme established by lack of proof of acceptance by purchasers of obligation enforceable against them by those deriving title from vendors).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(iii) Schemes of Development/625. Formation of a building scheme.

## 625. Formation of a building scheme.

In some instances of building schemes purchasers have been required to execute a deed of mutual covenants expressly giving to each the benefit, and imposing on each the liability, of the restrictions<sup>1</sup>. This is not, however, essential<sup>2</sup>. The conveyance to each should be made subject to the restrictions, but the title of each to the benefit of the covenants is sufficiently established wherever the four traditional requirements<sup>3</sup> exist<sup>4</sup>. If the purchases are simultaneous, it is possible to imply a mutual contract under which the benefit of the covenants is annexed to each plot of land<sup>5</sup>, and thereafter passes upon a conveyance of the plot without express mention<sup>6</sup>. The purchases need not be simultaneous<sup>7</sup>, and the circumstances may exclude the possibility of such a contract. It is sufficient that at the time of each purchase the community of interest necessarily requires and imports in equity reciprocity of obligation<sup>8</sup>. Requirements with regard to registration must be observed if the restrictions are to bind subsequent purchasers<sup>9</sup>.

1 See *Whatman v Gibson* (1838) 9 Sim 196; *Renals v Cowlshaw* (1878) 9 ChD 125 at 129; affd (1879) 11 ChD 866, CA. Where a deed is prepared, a person who takes the benefit of it is bound by the restrictions contained in it, even though he does not execute it: *Formby v Barker* [1903] 2 Ch 539 at 549, CA; *Elliston v Reacher* [1908] 2 Ch 665 at 669, CA; cf *Halsall v Brizell* [1957] Ch 169, [1957] 1 All ER 371; and see Co Litt 230b. Where purchasers under a building scheme subsequently enter into a new deed of mutual covenants, this does not create a new scheme and will terminate the original scheme unless clearly expressed to be supplemental to the original deed or conveyance: *Re Pinewood Estate, Farnborough* [1958] Ch 280, [1957] 2 All ER 517.

2 Such deeds are now rarely used. Where on a sub-sale the restrictions are placed in a schedule to the conveyance, a reference in them to the 'vendor' means the original vendor: *Mayner v Payne* [1914] 2 Ch 555.

3 See PARA 624 ante at heads (1)-(4) in the text.

4 *Elliston v Reacher* [1908] 2 Ch 374 at 385; on appeal [1908] 2 Ch 665, CA.

5 *Renals v Cowlshaw* (1878) 9 ChD 125 at 129 per Hall V-C; on appeal (1879) 11 ChD 866, CA.

6 See PARA 622 ante.

7 *Elliston v Reacher* [1908] 2 Ch 374 at 385; affd [1908] 2 Ch 665, CA. In *Rowell v Satchell* [1903] 2 Ch 212 it was held that, where an estate is sold in lots at successive sales under a building scheme, a purchaser may enforce the restrictions only against property shown as allotted in the plan and subject to the restrictions at the sale at which he purchases; but lotting is not necessary where there is a scheme of development arising out of common interests and intentions: see *Baxter v Four Oaks Properties Ltd* [1965] Ch 816, [1965] 1 All ER 906; and PARA 624 ante.

8 *Spicer v Martin* (1888) 14 App Cas 12 at 25, HL, per Lord Macnaghten; *Elliston v Reacher* [1908] 2 Ch 374; affd [1908] 2 Ch 665, CA; *Re Dolphin's Conveyance, Birmingham Corp'n v Boden* [1970] Ch 654 at 663, [1970] 2 All ER 664 at 670-671; *Brunner v Greenslade* [1971] Ch 993 at 1004-1005, [1970] 3 All ER 833 at 840-841; *Lund v Taylor* (1975) 31 P & CR 167, CA; *Kingsbury v LW Anderson Ltd* (1979) 40 P & CR 136; *Re Austin's Application* (1980) 42 P & CR 102, Lands Tribunal (distinguishing *Brunner v Greenslade* supra); and see *Eastwood v Lever* (1863) 4 De GJ & Sm 114; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 192. Where a covenant refers to the consent of the vendor and his 'assigns', this does not include all subsequent purchasers and tenants of any part of the estate: *Everett v Remington* [1892] 3 Ch 148. Where a purchaser under a building scheme sub-divides his plot, the sub-purchasers are bound by the original covenants between themselves if they take with notice of them; there is community of interest which creates obligations between them: *Lawrence v South County Freeholds Ltd* [1939] Ch 656, [1939] 2 All ER 503; *Brunner v Greenslade* supra; cf *King v Dickeson* (1889) 40 ChD 596 (which can perhaps be explained on the basis of non-derogation from grant

as between mortgagor and mortgagee: see *Lawrence v South County Freeholds Ltd* supra at 677 and at 520-521). Similarly, where some of the original plots sold subsequently come into common ownership, this does not prevent later purchasers of plots from the common owner with notice of the original covenants from enforcing them between themselves: *Texaco Antilles Ltd v Kernochan* [1973] AC 609, [1973] 2 All ER 118, PC.

9 See PARA 620 the text and notes 9-13 ante.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(iii) Schemes of Development/626. Other schemes of development.

## 626. Other schemes of development.

Reciprocal obligations and rights can exist without a building scheme<sup>1</sup>. The cases relating to building schemes stem from the wider rule that, when the owner of land deals with it on the footing of imposing restrictive obligations on the use of various parts of it as and when he sells them off for the common benefit of himself (in so far as he retains any land) and of the various purchasers among themselves, a court of equity will give effect to this common intention<sup>2</sup>. That is to say, when purchasers, as regards each other, come under reciprocal obligations and are entitled to reciprocal rights in circumstances in which the vendor, on a sale of neighbouring land (but without, it seems, a building scheme), puts each purchaser under the same restrictive covenants, and the purchasers are aware of their common liability<sup>3</sup>, the purchasers may enforce their rights in equity without making the vendor a party<sup>4</sup>. Furthermore, the equity may enable sub-purchasers to enforce covenants between themselves<sup>5</sup>. Such a scheme constitutes a local law for the area over which it extends<sup>6</sup>.

Mutual obligations do not arise, however, merely from a uniform system of disposing of an estate<sup>7</sup>; and, if the covenants were imposed by the vendor for his own benefit only, a purchaser cannot sue in respect of a breach by another purchaser<sup>8</sup>.

The principles behind a building or letting scheme whereby restrictive covenants can be mutually enforceable as part of a local law by the owners or lessees of individual plots or buildings can be extended to a commercial context where competing traders hold business leases within a single development. It is necessary to ensure that the scheme was fully agreed by everyone and in clear terms<sup>9</sup>.

1 See PARA 617 ante.

2 *Baxter v Four Oaks Properties Ltd* [1965] Ch 816 at 825, [1965] 1 All ER 906 at 913; *Re Dolphin's Conveyance, Birmingham Corpn v Boden* [1970] Ch 654 at 663, [1970] 2 All ER 664 at 670-671.

3 *Nottingham Patent Brick and Tile Co v Butler* (1885) 15 QBD 261 at 268; affd (1886) 16 QBD 778 at 784, CA; *Collins v Castle* (1887) 36 ChD 243; *Long v Gray* (1913) 58 Sol Jo 46, CA; *Torbay Hotel Ltd v Jenkins* [1927] 2 Ch 225; *White v Bijou Mansions Ltd* [1938] Ch 351, [1938] 1 All ER 546, CA. The area over which the mutual obligations are to arise must be sufficiently defined: *Torbay Hotel Ltd v Jenkins* supra.

4 *Whatman v Gibson* (1838) 9 Sim 196; *Child v Douglas* (1854) Kay 560 at 570. The question whether this result is intended is one of fact to be decided on the ordinary rules of evidence, but it is usually inferred under the circumstances stated: see *Nottingham Patent Brick and Tile Co v Butler* (1886) 16 QBD 778 at 784, CA, per Lord Esher MR. It is not, however, essential that a subsequent purchaser should enter into the covenant; without his doing so the benefit of the first purchaser's covenant may be annexed to the land retained by the vendor and pass to a subsequent purchaser of the whole or part: *Child v Douglas* supra at 569.

5 *Brunner v Greenslade* [1971] Ch 993, [1970] 3 All ER 833.

6 *Reid v Bickerstaff* [1909] 2 Ch 305, CA; *Baxter v Four Oaks Properties Ltd* [1965] Ch 816, [1965] 1 All ER 906. There is no scheme if the covenant on which it purports to be based is void: *Ridley v Lee* [1935] Ch 591. Where there is no scheme, a deed showing an intention of the parties to be mutually bound does not make the benefit of the covenants run with the land: *Re Pinewood Estate, Farnborough* [1958] Ch 280, [1957] 2 All ER 517. The mere exhibition by the vendor of a plan of the proposed development does not form a contract: *Tucker v Vowles* [1893] 1 Ch 195 at 208; *Osborne v Bradley* [1903] 2 Ch 446; *Whitehouse v Hugh* [1906] 2 Ch 283, CA; *Hodges v Jones* [1935] Ch 657; and see *Heriot's Hospital Feoffees v Gibson* (1814) 2 Dow 301. It is otherwise, however, if the plan is put forward as part of a general scheme: *Tindall v Castle* (1893) 62 LJ Ch 555.

7     *Kelly v Barrett* [1924] 2 Ch 379, CA.

8     *Master v Hansard* (1876) 4 ChD 718, CA; *Sheppard v Gilmore* (1887) 57 LJ Ch 6; cf *Keates v Lyon* (1869) 4 Ch App 218.

9     *Williams v Kiley (t/a CK Supermarkets Ltd)* [2002] EWCA Civ 1645, [2003] 1 P & CR D38, [2002] All ER (D) 301 (Nov).



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(iv) Remedies for Breach of Restrictive Covenants/627. Injunction.

## (iv) Remedies for Breach of Restrictive Covenants

### 627. Injunction.

A person who acquires land with notice of a restrictive covenant affecting its use may be restrained by injunction from using it in breach of the covenant<sup>1</sup>, but generally only if the claimant has an interest in other land for the benefit of which the covenant was taken<sup>2</sup>. It is not essential to prove substantial damage<sup>3</sup>. An injunction may be granted to restrain the sale of land by a covenantor where the sale is subject to a requirement as to user which would constitute a breach of covenant<sup>4</sup>, or is merely a device or sham to evade a covenant<sup>5</sup>, but not where a covenantor, in selling, merely knows that the purchaser intends to use the land in breach of covenant<sup>6</sup>.

A mandatory injunction to demolish buildings erected in breach of covenant is not likely to be granted where it is unnecessary to demolish them in order to preserve the integrity of the covenants imposed on other land in the area. Even where building in breach of covenant has continued in the face of protest or proceedings issued by the covenantee, there is no rule that he will be granted a mandatory injunction ordering the demolition of the buildings<sup>7</sup>. The court will not be reluctant to order demolition, however, where a builder has proceeded to build with full knowledge of the covenantee's challenge<sup>8</sup>.

1 *Tulk v Moxhay* (1848) 2 Ph 774; *Kemp v Sober* (1851) 1 Sim NS 517; *affd* (1852) 19 LTOS 308 (covenant not to carry on any business); *A-G v Briggs, A-G v Birmingham and Oxford Junction Rly Co* (1855) 1 Jur NS 1084 (covenant not to erect buildings on the land); *Hodson v Coppard* (1860) 29 Beav 4 (covenant not to carry on particular trades); *Lloyd v London, Chatham and Dover Rly Co* (1865) 2 De GJ & Sm 568 (covenant not to build beyond a certain height); *Western v MacDermott* (1866) 2 Ch App 72 (covenant relating to what should be done in a garden of a house); *Hall v Box* (1870) 18 WR 820 (erection of a public house, which was impliedly, although not expressly, forbidden, restrained); *Lord Manners v Johnson* (1875) 1 ChD 673 (covenant not to erect buildings nearer the road than the frontage line of the existing houses); *Richards v Revitt* (1877) 7 ChD 224 (covenant against the carrying on of certain trades); *German v Chapman* (1877) 7 ChD 271, CA (covenant not to carry on any business); *Hobson v Tulloch* [1898] 1 Ch 424 (covenant not to use house otherwise than as a dwelling house broken by its use as a boarding-house for scholars); *Eagling v Gardner* [1970] 2 All ER 838 (covenant not to erect any buildings save a private dwelling house); *Windsor Hotel (Newquay) Ltd v Allan* [1981] JPL 274, CA (covenant not to erect new building broken by building a barbecue); *C & G Homes Ltd v Secretary of State for Health* [1991] Ch 365, [1990] 1 WLR 1272; *affd in part* [1991] Ch 365 at 376, [1991] 2 All ER 841, CA (covenant not to carry on a business or use otherwise than as a private dwelling house breached by use as a home for former mental patients). See *Co-operative Retail Services Ltd v Tesco Stores Ltd* (1998) 76 P & CR 328, CA (covenant over part of land did not extend to remainder); *Elliott v Safeway Stores plc* [1995] 1 WLR 1396 (covenant against carrying on a specified business not breached by use of land as access to other land, not subject to the burden, where specified business to be carried on); *Roberts v Howlett* [2002] 1 P & CR 234 (covenant not to use other than as a single private dwelling house not broken by lease to students comprising a genuine social unit).

2 See PARA 621 ante.

3 *Elliston v Reacher* [1908] 2 Ch 374 at 375; *affd* [1908] 2 Ch 665, CA; *Chatsworth Estates Co v Fewell* [1931] 1 Ch 224 at 233; but see *Sharp v Harrison* [1922] 1 Ch 502; *Kelly v Barrett* [1924] 2 Ch 379.

4 *Earl of Leicester v Wells-next-the-Sea UDC* [1973] Ch 110, [1972] 3 All ER 77.

5 *Albert Locke (1940) Ltd v Winsford UDC* (1973) 71 LGR 308.

6 *Tophams Ltd v Earl of Sefton* [1967] 1 AC 50, [1966] 1 All ER 1039, HL.

7 *Wrotham Park Estate Co v Parkside Homes Ltd*[1974] 2 All ER 321, [1974] 1 WLR 798. See *Gafford v Graham* (1998) 77 P & CR 73, [1998] 21 LS Gaz R 36, CA (plaintiff (now known as 'claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18) failed to apply for interlocutory relief (now 'interim' relief) and damages were awarded).

8 *Lund v AJA Taylor & Co Ltd* (1973) 230 Estates Gazette 363; *Wakeham v Wood* (1981) 43 P & CR 40, CA; *Viscount Chelsea v Muscatt*[1990] 2 EGLR 48, CA.

## **UPDATE**

### **627 Injunction**

NOTE 7--*Gafford*, cited, distinguished in *Mortimer v Bailey*[2004] EWCA Civ 1514, [2005] 2 P & CR 175 (mandatory injunction upheld); and *Harris v Williams-Wynne*[2006] EWCA Civ 104, [2006] 2 P & CR 595.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(iv) Remedies for Breach of Restrictive Covenants/628. Damages in lieu of injunction.

## **628. Damages in lieu of injunction.**

Where damages are awarded in lieu of an injunction, they will not necessarily be nominal, even though the claimant has suffered no loss or damage by the breach, but may be assessed on the basis of what it would have cost the defendant to obtain a release from the covenant<sup>1</sup>.

Where, however, the covenantee suffers substantial damage and is unwilling to accept damages in lieu of a mandatory injunction, the court has no jurisdiction to award damages in lieu of such an injunction, whether the breach is by the original covenantor or by an assignee with notice<sup>2</sup>.

<sup>1</sup> *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798; and see *Shaw v Applegate* [1978] 1 All ER 123, [1977] 1 WLR 970, CA; *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705, [1993] 1 WLR 1361, CA; *Jaggard v Sawyer* [1995] 2 All ER 189, [1995] 1 WLR 269, CA; *Gafford v Graham* (1998) 77 P & CR 73, [1998] 21 LS Gaz R 36, CA; *Amec Developments Ltd v Jury's Hotel Management (UK) Ltd* (2000) 82 P & CR 286, [2000] All ER (D) 1866. See also *Hammersmith and Fulham London Borough Council Ltd v Creska* (1999) 78 P & CR D46, [1999] All ER (D) 644.

<sup>2</sup> *Achilli v Tovell* [1927] 2 Ch 243; criticised by Watkins LJ in *Wakeham v Wood* (1981) 43 P & CR 40, CA. See also *Sharp v Harrison* [1922] 1 Ch 502; *Charrington v Simons & Co Ltd* [1970] 2 All ER 257 at 261, [1970] 1 WLR 725 at 730 per Buckley J (varied on appeal [1971] 2 All ER 588, [1971] 1 WLR 598, CA); *Shepherd Homes Ltd v Sandham* [1971] Ch 340, [1970] 3 All ER 402; *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798.

### **UPDATE**

## **628 Damages in lieu of injunction**

NOTE 1--*Gafford*, cited, distinguished in *Mortimer v Bailey* [2004] EWCA Civ 1514, [2005] 2 P & CR 175; and *Harris v Williams-Wynne* [2006] EWCA Civ 104, [2006] 2 P & CR 595.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(v) Discharge and Modification of Restrictive Covenants/A. DISCHARGE APART FROM STATUTE/629. Discharge of covenants apart from statute.

## **(v) Discharge and Modification of Restrictive Covenants**

### **A. DISCHARGE APART FROM STATUTE**

#### **629. Discharge of covenants apart from statute.**

Where a vendor, in developing his estate, takes a covenant for his own benefit merely<sup>1</sup>, he is the only person entitled to enforce it, and he may release the covenant<sup>2</sup> or, by acquiescing in breaches, lose the benefit of it<sup>3</sup>; but the fact that he has acquiesced in a minor infringement does not prevent his suing in respect of a substantial infringement<sup>4</sup>. The test has been said to be whether in the circumstances it has become unconscionable for the claimant to rely upon his legal right<sup>5</sup>. Where the covenants are intended to be available for the purchasers between themselves, so that in general any purchaser may enforce them against other purchasers<sup>6</sup>, the vendor, in imposing the covenants, may reserve to himself the right to waive or vary them with regard to unsold lots<sup>7</sup>, or generally<sup>8</sup>; or the covenants may prohibit the doing of specified acts without the vendor's consent, and then the consent may be given as regards lots on the estate whenever sold<sup>9</sup>. Where, under a building scheme or otherwise, the benefit of the covenant is vested in a number of owners<sup>10</sup>, any one of them may release his right to enforce the covenant, or may lose his right to enforce it by acquiescing in systematic breaches<sup>11</sup>.

Apart from release of the covenants by the persons entitled to enforce them, a restrictive covenant ceases to be enforceable if the character of the estate has undergone so complete a change that the covenant is no longer capable of attaining the object for which it was imposed<sup>12</sup> and is of no value<sup>13</sup>.

Where the fee simple in the benefited land and in the burdened land becomes vested in the same person, the restrictive covenants automatically come to an end and will not revive on a subsequent severance unless the common owner recreates them<sup>14</sup>. Where, however, the restrictive covenants came into existence under a scheme of development, they will not cease to be enforceable between the owners of two parts within the scheme merely because it can be shown that those two parts were either at the inception of the scheme or at any time subsequently in common ownership<sup>15</sup>.

1 See PARA 621 ante.

2 The covenant will be presumed to have been released if there has been for many years an open enjoyment of the land inconsistent with it: *Gibson v Doeg* (1857) 2 H & N 615, Ex Ch; *Hepworth v Pickles* [1900] 1 Ch 108; cf *Lloyds Bank Ltd v Jones* [1955] 2 QB 298, [1955] 2 All ER 409, CA. See also LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 506-507.

3 *Roper v Williams* (1822) Turn & R 18; *Peek v Matthews* (1867) LR 3 Eq 515; *Sobey v Sainsbury* [1913] 2 Ch 513 at 528.

4 *Richards v Revitt* (1877) 7 ChD 224; *Osborne v Bradley* [1903] 2 Ch 446 at 456; *Sansom v James* (1973) 227 Estates Gazette 991.

5 *Shaw v Applegate* [1978] 1 All ER 123, CA; *HP Bulmer Ltd v J Bollinger SA* [1977] 2 CMLR 625, CA; *Gafford v Graham* (1998) 77 P & CR 73, [1998] 21 LS Gaz R 36, CA (delay of several years before plaintiff successfully commenced proceedings; but on appeal the injunction was discharged and damages only were awarded).

6 See PARA 624 ante.

7 *Osborne v Bradley*[1903] 2 Ch 446; *Elliston v Reacher*[1908] 2 Ch 374; affd [1908] 2 Ch 665, CA; and see *Re Wembley Park Estate Co Ltd's Transfer, London Sephardi Trust v Baker*[1968] Ch 491, [1968] 1 All ER 457.

8 *Whitehouse v Hugh*[1906] 2 Ch 283, CA; *Mayner v Payne*[1914] 2 Ch 555.

9 *Everett v Remington*[1892] 3 Ch 148; *Chatsworth Estates Co v Fewell*[1931] 1 Ch 224. The fact that the vendor has licensed the use of premises on the estate for purposes forbidden by the covenant does not, however, prevent him from enforcing the covenant as to other premises, unless he has by his acts or omissions in the management of the estate in effect represented that the covenants are no longer enforceable: *Chatsworth Estates Co v Fewell* supra. A proviso to covenants imposed by a vendor freeing the burdened land from restrictions as to user is not brought into operation by a sale under a compulsory purchase order: *Marten v Flight Refuelling Ltd*[1962] Ch 115 at 141-142, [1961] 2 All ER 696 at 709-710.

10 See PARA 624 et seq ante.

11 *Sayers v Collyer*(1884) 28 ChD 103, CA. Acquiescence implies knowledge, and breaches of covenant on a remote part of the estate do not establish acquiescence on the part of the claimant without proof that he was aware of them (*Knight v Simmonds*[1896] 2 Ch 294, CA); nor is a claimant prevented from suing because he has acquiesced in, or been himself a party to, slight breaches (*Western v MacDermott*(1866) 2 Ch App 72; *Jackson v Winniffrith* (1882) 47 LT 243; *Chitty v Bray* (1883) 48 LT 860; *Hooper v Bromet* (1903) 89 LT 37; on appeal (1904) 90 LT 234, CA). A sub-purchaser is not necessarily prevented from suing because his vendor has committed a breach of covenant in another part of the lot: *Rowell v Satchell*[1903] 2 Ch 212.

Where leaseholds are subject to a building scheme, the restrictive covenants are not in equity destroyed as regards one of the properties by the surrender or merger of the lease of that property: see *Frost v King Edward VII Welsh National Memorial Association for Prevention, Treatment and Abolition of Tuberculosis*[1918] 2 Ch 180 at 194.

12 *Duke of Bedford v British Museum Trustees* (1822) 2 My & K 552; *Knight v Simmonds*[1896] 2 Ch 294, CA; *Sobey v Sainsbury*[1913] 2 Ch 513; and see *Ramuz v Leigh-on-Sea Conservative and Unionist Club Ltd* (1915) 31 TLR 174 (erection of shops not a change in the character of the estate, the scheme not being purely residential); *Westripp v Baldcock*[1938] 2 All ER 779; affd [1939] 1 All ER 279, CA (street in existence in 1874 and remained mainly residential); cf *Pulleyn v France* (1912) 57 Sol Jo 173, CA (in addition to a change in the character of the neighbourhood, it was necessary to prove personal acquiescence on the part of the person seeking to enforce the covenant). The person entitled to enforce the covenants must be himself substantially responsible for the changes: *White v Bijou Mansions Ltd*[1937] Ch 610 at 626, [1937] 3 All ER 269 at 278; on appeal [1938] Ch 351, [1938] 1 All ER 546, CA. The covenant is not waived or extinguished by the covenantee's allowing it to be relaxed in a remote part of the estate where the relaxation does not affect its general character: *German v Chapman*(1877) 7 ChD 271, CA.

13 *Chatsworth Estates Co v Fewell*[1931] 1 Ch 224 at 229-230; and see *Re Truman, Hanbury, Buxton & Co Ltd's Application*[1956] 1 QB 261, [1955] 3 All ER 559, CA.

14 *Re Tiltwood, Sussex, Barrett v Bond*[1978] Ch 269, [1978] 2 All ER 1091; *Brunner v Greenslade*[1971] Ch 993, [1970] 3 All ER 833; *Texaco Antilles Ltd v Kernochan*[1973] AC 609, [1973] 2 All ER 118, PC; *Re Victoria Recreation Ground, Portslade's Application* (1979) 41 P & CR 119, Lands Tribunal; *Re MCA East Ltd*[2002] EWHC 1684 (Ch), [2003] 1 P & CR 118, [2002] All ER (D) 396 (Jul).

15 *Brunner v Greenslade*[1971] 1 Ch 993, [1970] 3 All ER 833; *Texaco Antilles Ltd v Kernochan*[1973] AC 609, [1973] 2 All ER 118, PC.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(v) Discharge and Modification of Restrictive Covenants/B. DISCHARGE OR MODIFICATION UNDER STATUTORY POWER/(A) Jurisdiction of the Lands Tribunal/630. Power to discharge or modify covenants affecting land.

## **B. DISCHARGE OR MODIFICATION UNDER STATUTORY POWER**

### **(A) JURISDICTION OF THE LANDS TRIBUNAL**

#### **630. Power to discharge or modify covenants affecting land.**

The Lands Tribunal<sup>1</sup> has power from time to time, on the application of any person interested<sup>2</sup> in any freehold land<sup>3</sup> affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon<sup>4</sup>, by order wholly or partially<sup>5</sup> to discharge or modify any such restriction<sup>6</sup> on being satisfied that one of the specified conditions<sup>7</sup> exists<sup>8</sup>.

The tribunal's power so to modify a restriction includes power to add such further provisions restricting the user of, or the building on, the land affected as appear to it to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant, and the tribunal may accordingly refuse to modify a restriction without some such addition<sup>9</sup>.

The county court has a distinct power under certain circumstances to vary the terms of a lease or other instrument imposing a restrictive covenant<sup>10</sup>.

Where land subject to a restrictive covenant is acquired under the Lands Clauses Consolidation Act 1845, the covenant may be discharged by its becoming impossible for the covenantor or his successors in title to perform it upon the land<sup>11</sup>, and in that event compensation may be claimed<sup>12</sup>. A breach of a restrictive covenant may also be authorised, subject to the payment of compensation, by development of the land in conformity with planning control after being acquired compulsorily for planning purposes under town and country planning legislation<sup>13</sup>. On a sale to realise a charge for street improvement expenses, however, an order for sale free from a restrictive covenant binding the land could not be made<sup>14</sup>.

The system of control of development under the Town and Country Planning Act 1990<sup>15</sup> is separate from that under the Law of Property Act 1925<sup>16</sup>; and the fact that planning permission has been granted for a development which would breach a restrictive covenant does not necessarily result in the Lands Tribunal's having to discharge the covenant, although it is a circumstance which it should take into account<sup>17</sup>.

1 As to the constitution of the Lands Tribunal see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 720.

2 For these purposes, a person has an interest in land if he has entered into a contract to purchase the land, even if the contract is conditional upon the making of an order by the Lands Tribunal under its power: *Re Pioneer Properties Ltd's Application* (1956) 7 P & CR 264, Lands Tribunal; *Re Crest Homes plc's Application* (1983) 48 P & CR 309, Lands Tribunal. See also *Re Barry's Application* (1980) 41 P & CR 383, Lands Tribunal (members of self-help building group).

3 The provision applies in certain cases to leasehold land also: see PARA 631 post.

4 Although the Lands Tribunal may have to consider whether land is affected by a restriction so as to give it jurisdiction, it has no power to make a final binding decision as to whether or not land is affected by a restriction imposed by any instrument: *Re Purkiss' Application* [1962] 2 All ER 690, [1962] 1 WLR 902, CA. There is, however, no general rule that the tribunal is bound to abstain from resolving points of law merely because they are said to be difficult: *Shepherd Homes Ltd v Sandham (No 2)* [1971] 2 All ER 1267 at 1276, [1971] 1 WLR 1062 at 1072 obiter per Megarry J.

5 'Partially' does not refer to time, and the Lands Tribunal has no power to lift a restriction for a limited time: *Re Bell Bar Farm* (1951) 101 L Jo 654.

6 As to the excepted restrictions see PARA 631 post. There is no jurisdiction to modify positive covenants: see *Westminster City Council v Duke of Westminster*[1991] 4 All ER 136, 23 HLR 174; revsd on other grounds (1992) 24 HLR 572, CA. The tribunal's discretion is not limited or abrogated merely because an application for the discharge of a restrictive covenant is unopposed: *Re University of Westminster, University of Westminster v President of the Lands Tribunal*[1998] 3 All ER 1014, [1998] 33 LS Gaz R 33, CA.

7 As to the specified conditions see PARA 632 post.

8 Law of Property Act 1925 s 84(1) (s 84 amended by the Law of Property Act 1969 s 28, Sch 3). The Law of Property Act 1925 s 84 (as so amended) applies (1) to restrictions whether subsisting at 1 January 1926 or imposed thereafter (s 84(7)); (2) whether the land affected by the restrictions is registered or not (s 84(8) (amended by the Land Registration Act 2002 ss 133, 135, Sch 11 para 2(1), (5), Sch 13)). Doubt was expressed in *Re Milius's Application* (1995) 70 P & CR 427, [1996] RVR 91, Lands Tribunal, as to whether there was jurisdiction in relation to a covenant not to dispose of property except to local residents. The tribunal's discretion is not limited or abrogated merely because an application for the discharge of a restrictive covenant is unopposed: *Re University of Westminster, University of Westminster v President of the Lands Tribunal*[1998] 3 All ER 1014, [1998] 33 LS Gaz R 33, CA.

9 Law of Property Act 1925 s 84(1C) (as added: see note 8 supra). See *Re Patten Ltd's Application* (1975) 31 P & CR 180, Lands Tribunal; *Re Forestmere Properties Ltd's Application* (1980) 41 P & CR 390, Lands Tribunal.

10 See the Housing Act 1985 s 610 (as amended); and HOUSING vol 22 (2006 Reissue) PARA 65.

11 See *Baily v De Crespigny*(1869) LR 4 QB 180.

12 See COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 879.

13 See the New Towns Act 1981 s 19 (as amended); the Town and Country Planning Act 1990 s 237; *Sutton London Borough Council v Bolton* (1993) 91 LGR 566, 68 P & CR 166; but cf *Thames Water Utilities Ltd v Oxford City Council*[1999] 1 EGLR 167, [1998] 31 LS Gaz R 37 (the Town and Country Planning Act 1990 s 237 does not authorise use in contravention of restrictive covenants). See further TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 954; TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1367. In certain circumstances a local authority may be bound by covenants entered into under the Leasehold Reform Act 1967 ss 29, 30 (as amended) if it subsequently acquires the burdened land by compulsory purchase, but the covenantee's rights are treated as an interest in the land affected and as capable of being, and liable to be, extinguished by being compulsorily acquired: see Sch 4 para 1(7) (as amended); and LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1458.

14 *Tendring Union Guardians v Dowton*[1891] 3 Ch 265, CA (decided on the Public Health Act 1875 ss 150, 257 (repealed)).

15 See in particular the Town and Country Planning Act 1990 s 106 (as substituted) (power of local planning authority to impose a planning obligation which it may enforce against (1) the person entering into the obligation; and (2) any person deriving title from that person); and TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARAS 244-245.

16 See in particular the Law of Property Act 1925 s 84 (as amended); and PARA 631 et seq post.

17 *Re Brierfield's Application* (1976) 35 P & CR 124, Lands Tribunal; *Re Martin's Application* (1988) 57 P & CR 119, CA; *Re Jones' and White & Co's Application* (1989) 58 P & CR 512, Lands Tribunal; *R v Tunbridge Wells Borough Council, ex p Blue Boys Development Ltd* (1989) 59 P & CR 315; *Re Willis's Application* (1997) 76 P & CR 97, Lands Tribunal.

## UPDATE

### 630-641 Discharge or modification under statutory power

References to the Lands Tribunal are now to the Upper Tribunal: Law of Property Act 1925 s 84 (further amended by SI 2009/1307).

### 630 Power to discharge or modify covenants affecting land

NOTE 8--See *Hotchkin v McDonald* [2004] 18 EG 100 (CS), CA (where Lands Tribunal decided to discharge or modify user covenant under 1925 Act s 84(1), right of way could also be altered to reflect change in character of property).



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(v) Discharge and Modification of Restrictive Covenants/B. DISCHARGE OR MODIFICATION UNDER STATUTORY POWER/(A) Jurisdiction of the Lands Tribunal/631. Excepted restrictions.

### 631. Excepted restrictions.

The Lands Tribunal's power to discharge or modify restrictive covenants<sup>1</sup> does not apply to:

- 74 (1) restrictions imposed on the occasion of a disposition made gratuitously or for a nominal consideration for public purposes<sup>2</sup>;
- 75 (2) restrictions imposed by the Commissioners of Works under any statutory power for the protection of any royal park or garden or to restrictions of a like character imposed upon the occasion of any enfranchisement effected before 1 January 1926 of Crown manors<sup>3</sup>;
- 76 (3) restrictions created or imposed for naval, military or air force purposes<sup>4</sup> or for civil aviation<sup>5</sup> purposes<sup>6</sup>;
- 77 (4) restrictions imposed by a deed or covenant entered into under the Green Belt (London and Home Counties) Act 1938<sup>7</sup>;
- 78 (5) restrictions imposed under the Defence Acts<sup>8</sup> or under the Land Powers (Defence) Act 1958<sup>9</sup> so long as the restriction is enforceable by a Minister against the persons for the time being entitled to the land adversely affected thereby<sup>10</sup>;
- 79 (6) covenants entered into in accordance with the Leasehold Reform Act 1967<sup>11</sup> by a tenant acquiring the freehold of premises from a local authority<sup>12</sup>;
- 80 (7) a forestry dedication covenant<sup>13</sup>;
- 81 (8) restrictions imposed for the protection of inalienable National Trust property<sup>14</sup>;
- 82 (9) agreements entered into<sup>15</sup> under the Ancient Monuments and Archaeological Areas Act 1979<sup>16</sup>;
- 83 (10) a planning obligation<sup>17</sup> under the Town and Country Planning Act 1990<sup>18</sup>.

The tribunal's jurisdiction is not, however, affected by the fact that the person seeking relief was a contracting party to the covenant imposing the restriction<sup>19</sup>, nor by the fact that the covenant imposing the restriction is personal to the covenantor and does not run with the land<sup>20</sup>.

The tribunal's jurisdiction does not arise unless the restriction affects freehold land<sup>21</sup> or leasehold land let, otherwise than on a mining lease<sup>22</sup>, for more than 40 years after the expiration of 25 years of the term<sup>23</sup> or, in the case of certain leasehold land rendered unfit by war damage, whatever the term of the lease and the period of it which has expired<sup>24</sup>.

1    le under the Law of Property Act 1925 s 84 (as amended): see PARA 630 ante.

2    Ibid s 84(7); *Re Plumpton Parish Council's Application* (1962) 14 P & CR 234, Lands Tribunal. As to the application of the Law of Property Act 1925 s 84 (as amended) see PARA 630 note 8 ante. See also *Westminster City Council v Duke of Westminster* [1991] 4 All ER 136, 23 HLR 174; revsd on other grounds (1992) 24 HLR 572, CA.

3    Law of Property Act 1925 s 84(11) (amended by the Law of Property Act 1969 s 28(1)(b), (9)). As to the management of royal parks see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 501; CROWN PROPERTY vol 12(1) (Reissue) PARA 367.

4 Law of Property Act 1925 s 84(11)(a). Section 84(11)(a) is subject to s 84(11A) (as added): s 84(11) (as amended: see note 3 supra). Section 84(11) (as so amended) excludes the application of s 84 (as amended) to a restriction falling within s 84(11)(a), and not created or imposed in connection with the use of any land as an aerodrome, only so long as the restriction is enforceable by or on behalf of the Crown: s 84(11A)(a) (added by the Law of Property Act 1969 s 28(1)(b), (9)); Requisitioned Land and War Works Act 1945 s 38(3) (amended by the Law of Property Act 1969 s 28(10)). As to the powers of imposing restrictions for naval, military and air force purposes see ARMED FORCES.

5 Ie under the powers of the Air Navigation Act 1920 (repealed), the Civil Aviation Act 1949 ss 19 or 23 (both repealed) or the Civil Aviation Act 1982 s 30 (as amended) or s 41: see AIR LAW vol 2 (2008) PARAS 47, 186.

6 Law of Property Act 1925 s 84(11)(b) (substituted by the Civil Aviation Act 1982 s 109(2), Sch 15 para 1). The Law of Property Act 1925 s 84(11)(b) (as so substituted) is subject to s 84(11A) (as added: see note 4 supra): s 84(11) (as amended: see note 3 supra). Section 84(11) (as so amended) excludes the application of s 84 (as amended) to a restriction falling within s 84(11)(b) (as so substituted), or created or imposed in connection with the use of any land as an aerodrome, only so long as the restriction is enforceable by or on behalf of the Crown or any public or international authority: s 84(11A)(b) (as so added). As to the power to control land for civil aviation purposes see AIR LAW vol 2 (2008) PARA 199 et seq.

7 See the Green Belt (London and Home Counties) Act 1938 s 22(2); *R (on the application of O'Byrne) v Secretary of State for the Environment, Transport and the Regions* [2002] UKHL 46, [2003] 1 All ER 15, [2002] 1 WLR 3250; and TOWN AND COUNTRY PLANNING vol 46(2) (2010) PARA 938.

8 For the Acts which may be cited as 'the Defence Acts' see ARMED FORCES.

9 Ie under the Land Powers (Defence) Act 1958 s 13 (as amended).

10 See the Requisitioned Land and War Works Act 1945 s 38(3) (amended by the Law of Property Act 1969 s 28(10)); and WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 530.

11 Ie in accordance with the Leasehold Reform Act 1967 s 29 or s 30 (as amended): see LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARAS 1456-1457, 1477-1478.

12 See *ibid* s 29(3), Sch 4 para 1(5); and LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARAS 1456, 1458, 1477.

13 See the Forestry Act 1967 s 5(2)(b); and FORESTRY vol 52 (2009) PARA 117.

14 See the National Trust Act 1971 s 27; and NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 991.

15 Ie under the Ancient Monuments and Archaeological Areas Act 1979 s 17 (as amended): see NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 1033.

16 See *ibid* s 17(7) (prospectively substituted by the Title Conditions (Scotland) Act 2003 s 128(1), Sch 14 para 8); and NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 1033.

17 Ie a planning obligation within the meaning of the Town and Country Planning Act 1990 s 106(1) (as substituted): see TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 244.

18 See *ibid* s 106A(10) (as substituted); and TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 246.

19 *Re Wickin's Application* [1962] RVR 571, CA; *Ridley v Taylor* [1965] 2 All ER 51, [1965] 1 WLR 611, CA; *Cresswell v Proctor* [1968] 2 All ER 682, [1968] 1 WLR 906, CA (court should be slow to exercise its discretion in favour of original covenantor within a very short period after covenant entered into; two years in this case); *Jones v Rhys-Jones* (1974) 30 P & CR 451, CA (no general principle that shortness of time a decisive factor); *Re Dransfield's Application* (1975) 31 P & CR 192, Lands Tribunal; *Re Brown's Application* (1977) 35 P & CR 254, Lands Tribunal; *Re New Ideal Homes Ltd's Application* (1978) 36 P & CR 476, Lands Tribunal; *Re Pearson's Application* (1978) 36 P & CR 285, Lands Tribunal; *Re Beecham Group Ltd's Application* (1980) 41 P & CR 369, Lands Tribunal; *Re Livingstone's Application* (1982) 47 P & CR 462, Lands Tribunal; *Re Beech's Application* (1990) 59 P & CR 502, Lands Tribunal.

20 *Shepherd Homes Ltd v Sandham (No 2)* [1971] 2 All ER 1267, [1971] 1 WLR 1062; *Gilbert v Spoor* [1983] Ch 27, [1982] 2 All ER 576, CA.

21 Law of Property Act 1925 s 84(1).

22 *Ibid* s 84(12) proviso. As to restrictions on working minerals required for support see the Mines (Working Facilities and Support) Act 1966 s 7 (as amended); and MINES, MINERALS AND QUARRIES.

23 Law of Property Act 1925 s 84(12) (amended by the Landlord and Tenant Act 1954 s 52). The term must be reckoned from the execution of the lease and not from its nominal commencement: *Earl Cadogan v Guinness* [1936] Ch 515, [1936] 2 All ER 29; but see *Ridley v Taylor* [1965] 2 All ER 51, [1965] 1 WLR 611, CA (modification refused, although 25 years of the term had expired, because less than 25 years had elapsed since the covenant had been expressly affirmed by the tenant in a licence).

24 See the Landlord and Tenant (War Damage) Act 1939 s 18(1), (4); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 507.

## **UPDATE**

### **630-641 Discharge or modification under statutory power**

References to the Lands Tribunal are now to the Upper Tribunal: Law of Property Act 1925 s 84 (further amended by SI 2009/1307).

### **631 Excepted restrictions**

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(v) Discharge and Modification of Restrictive Covenants/B. DISCHARGE OR MODIFICATION UNDER STATUTORY POWER/(A) Jurisdiction of the Lands Tribunal/632. Grounds of discharge or modification.

### 632. Grounds of discharge or modification.

The Lands Tribunal may exercise its power to discharge or modify a restrictive covenant<sup>1</sup> only where it is satisfied that one of the following conditions exists<sup>2</sup>:

- 84 (1) that by reason of changes in the character of the property or the neighbourhood<sup>3</sup> or other circumstances of the case which the Lands Tribunal may deem material, the restriction ought to be deemed obsolete<sup>4</sup>; or
- 85 (2) that the continued existence of the restriction would impede some reasonable user of the land for public or private purposes, or, as the case may be, would unless modified so impede such user<sup>5</sup>; and that the restriction, in impeding that user, either:
  - 3 3. (a) would not secure to persons entitled to the benefit of it any practical benefits<sup>6</sup> of substantial value or advantage to them<sup>7</sup>; or
  - 4 4. (b) is contrary to the public interest<sup>8</sup>,
- 86 and that money will be an adequate compensation for the loss or disadvantage, if any, which any such person will suffer from the discharge or modification<sup>9</sup>; or
- 87 (3) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified<sup>10</sup>; or
- 88 (4) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction<sup>11</sup>.

In determining whether a case is one falling under head (2) above and in determining whether, in any such case or otherwise, any restriction ought to be discharged or modified, the Lands Tribunal must take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which, and the context in which, the restriction was created or imposed and any other material circumstances<sup>12</sup>. Exceptionally, in the case of certain leasehold property rendered unfit by war damage, the tribunal may exercise its powers on being satisfied that the proposed discharge or modification is desirable in order to permit the economical use or development of the land comprised in the lease or is otherwise desirable in the national interest<sup>13</sup>.

Where there is a general building scheme, there is a greater presumption that a restrictive covenant will be upheld and therefore a greater onus of proof on an applicant to show that the statutory requirements<sup>14</sup> are satisfied<sup>15</sup>.

The jurisdiction to order discharge of a restriction is not necessarily co-extensive with the jurisdiction to order modification of that restriction. Whether either jurisdiction exists will depend on the findings of fact made in relation to whichever of the statutory grounds set out in heads (1) to (4) above are relied upon<sup>16</sup>.

1 le under the Law of Property Act 1925 s 84 (as amended): see PARAS 630-631 ante.

2 An applicant must affirmatively prove that one or other of the grounds for jurisdiction has been established; it is not enough for him to show simply that his proposal is reasonable: *Re Ghey and Galton's Application* [1957] 2 QB 650 at 659-660, [1957] 3 All ER 164 at 168, CA, per Lord Evershed MR; *Stannard v Issa* [1987] AC 175, [1987] 2 WLR 188, PC. The application in *Re Pennington's Application* [2002] RVR 271, Lands Tribunal, failed under the Law of Property Act 1925 s 84(1)(a), (aa) and (c) (as amended) (see heads (1), (2), (4) in the text).

3 A neighbourhood does not necessarily correspond with the boundaries of an estate which is the subject of a restrictive covenant; and changes which may have taken place in parts of an estate need not necessarily be such as to affect the character and value of properties on other parts: see *Re Wilson's Application* (1954) 164 Estates Gazette 269, Lands Tribunal.

4 Law of Property Act 1925 s 84(1)(a) (amended by the Law of Property Act 1969 s 28(1), (2)). As to the application of the Law of Property Act 1925 s 84 (as amended) see PARAS 630 note 8, 631 ante. Changes in the character of a neighbourhood, though considerable, may not be sufficient to cause the tribunal to consider a covenant obsolete: see eg *Re 3 St John's Road, Harrow* (1952) 102 L Jo 165. A restrictive covenant becomes obsolete when its original purpose can no longer be achieved: see *Re Truman, Hanbury, Buxton & Co Ltd's Application* [1956] 1 QB 261, [1955] 3 All ER 559, CA (change in character of neighbourhood; person still existing who would be prejudiced by discharge; discharge refused); *Re Abbey Homesteads (Developments) Ltd's Application* (1986) 53 P & CR 1, CA. For examples of obsolete restrictions see *Re Knott's Application* (1953) 7 P & CR 100, Lands Tribunal; *Re Hawkes' Application* (1955) 166 Estates Gazette 149, Lands Tribunal; *Re Briarwood Estates Ltd* (1979) 39 P & CR 419, Lands Tribunal; *Re Bradley Clare Estates Ltd's Application* (1987) 55 P & CR 126, Lands Tribunal; *Re Quaffers Ltd's Application* (1988) 56 P & CR 142, Lands Tribunal; *Re Barclays Bank plc's Application* (1990) 60 P & CR 354, Lands Tribunal; *Re Wards Construction (Medway) Ltd's Application* (1994) 67 P & CR 379, Lands Tribunal. In *Re Marcello Developments Ltd's Application*, [2002] RVR 146, Lands Tribunal, the covenants were modified and a small payment was ordered to be made as compensation. For examples of cases in which the restrictions have been held not to be obsolete see *Re Heath's Application* (1953) 7 P & CR 104, Lands Tribunal; *Re Reid's Application* (1954) 7 P & CR 165, Lands Tribunal; *Re Dr Barnado's Homes National Inc Association's Application* (1955) 7 P & CR 176, Lands Tribunal; *Re Dransfield's Application* (1975) 31 P & CR 192, Lands Tribunal; *Re Hughes' Application* [1983] JPL 318, Lands Tribunal; *Re Purnell's Application* (1987) 55 P & CR 133, Lands Tribunal; *Re Tarhale Ltd's Application* (1990) 60 P & CR 368, Lands Tribunal; *Re Sheehy's Application* (1991) 63 P & CR 95, [1992] JPL 78, Lands Tribunal; *Re North's Application* (1997) 75 P & CR 117, Lands Tribunal; *Re Caton's Application* [1999] 3 EGLR 121, [1999] 38 EG 193, Lands Tribunal; *Re Azfar's Application* [2002] 1 P & CR 215, Lands Tribunal. As to what the tribunal may take into consideration see *Driscoll v Church Comrs for England* [1957] 1 QB 330, [1956] 3 All ER 802, CA (restriction held not to be obsolete). In *Re Hedges' Application* (1956) 7 P & CR 270, Lands Tribunal, an application was refused because there had been no changes of character since modification of the original restrictions a year earlier. As to the 'thin end of the wedge' argument see *Re Forgacs' Application* (1976) 32 P & CR 464, Lands Tribunal; *Re Chapman's Application* (1980) 42 P & CR 114, Lands Tribunal; *Re Snaith and Dolding's Application* (1995) 71 P & CR 104, Lands Tribunal; *Re Page's Application* (1995) 71 P & CR 440, Lands Tribunal; *Re Hunt's Application* (1996) 73 P & CR 126, Lands Tribunal; *Re Diggins' Application (No 2)* [2001] 2 EGLR 163, Lands Tribunal; and see *McMorris v Brown* [1999] 1 AC 142, PC.

5 Law of Property Act 1925 s 84(1)(aa), (1A) (s 84(1)(aa) renumbered and amended, and s 84(1A) added, by the Law of Property Act 1969 s 28(1)(b), (2)). The Law of Property Act 1925 s 84(1)(aa) (as so renumbered and amended) will not be satisfied in the absence of a specific proposal: *Re Lloyds Bank Ltd's Application* (1976) 35 P & CR 128, Lands Tribunal. Cases such as *Re Wakefield Corpn's Application* (1953) 7 P & CR 90, Lands Tribunal are decisions on the old wording 'the reasonable user' amended to 'some reasonable user' by the Law of Property Act 1969: see *Re Bank's Application* (1976) 33 P & CR 138, Lands Tribunal; *Re Edwards' Application* (1983) 47 P & CR 458, Lands Tribunal; *Stannard v Issa* [1987] AC 175, [1987] 2 WLR 188, PC. In *Re Penketh, Mount Park Road* (1954) 163 Estates Gazette 506, restrictions were modified on the ground that they impeded the reasonable use of the land, but in order that development might be consistent within the neighbourhood a restriction on vehicular access was imposed. See also *Re Henderson's Conveyance* [1940] Ch 835, [1940] 4 All ER 1; *Re Reynolds' Application* (1987) 54 P & CR 121, Lands Tribunal; *Re Poulton's Application* (1992) 65 P & CR 319, Lands Tribunal; *Re Solarfilms (Sales) Ltd's Application* (1993) 67 P & CR 110, Lands Tribunal; *Re Nichols' Application* [1997] 1 EGLR 144, [1997] 20 EG 150, Lands Tribunal. As to what is a substantial value for these purposes see *Re Jillas' Application* [2000] 2 EGLR 99, [2000] 23 EG 147, Lands Tribunal.

6 *Stockport Metropolitan Borough Council v Alwiyah Developments* (1983) 52 P & CR 278, CA (the benefit envisaged must be a practical as opposed to a pecuniary one). The 'practical benefits' are the present effects of the covenant, not the effects originally intended: *Stannard v Issa* [1987] AC 175 at 188, [1987] 2 WLR 188 at 196, PC; *Re Diggins' Application (No 2)* [2001] 2 EGLR 163, Lands Tribunal (density restrictions secured practical benefits--the preservation of pleasant views, the preservation of privacy; the maintenance of the status quo, spaciousness and open character and prevention of unsuitable backland development). Cf *Re O'Reilly's Application* (1993) 66 P & CR 485, Lands Tribunal (no practical benefit).

7 Law of Property Act 1925 s 84(1A)(a) (added by the Law of Property Act 1969 s 28(1)(b), (2)). See *Re 3 St John's Road, Harrow* (1952) 102 L Jo 165 (use of private dwelling house as guest house); *Dolley v Clayton* (1956) 168 Estates Gazette 559, CA (modification granted subject to conditions); *Re Kershaw's Application* (1975) 31 P & CR 187, Lands Tribunal; *Re New Ideal Homes Ltd's Application* (1978) 36 P & CR 476, Lands Tribunal (restriction secured no practical advantage; application granted); *Re Bailey's Application* (1981) 42 P & CR 108, Lands Tribunal (restriction secured practical advantage; application refused); *Re Aliwiyah Development Ltd's Application* [1982] JPL 45, Lands Tribunal; *Gilbert v Spoor* [1983] Ch 27, [1982] 2 All ER 576, CA (beautiful view enjoyed from land nearby a practical benefit); *Re Speakman's Application* [1983] JPL 680, Lands Tribunal, applying *Gilbert v Spoor* supra (objectors entitled to rely on practical benefits which they received from restrictions wherever they happened to be); *Re Swift's Application* [1984] JPL 194, Lands Tribunal; *Re Beech's Application* (1990) 59 P & CR 502, Lands Tribunal (position of council considered both as owners of adjoining property and in the capacity of housing authority and as local planning authority); *Re Shah and Shah's Application* (1991) 62 P & CR 450, [1991] JPL 762, Lands Tribunal (use of dwelling house as nursing home); *Re Seven Trent Water Ltd's Application* (1993) 67 P & CR 236, [1993] JPL 865, Lands Tribunal; *Re Wallace & Co's Application* (1993) 66 P & CR 124, Lands Tribunal; *Re Hopcraft's Application* (1993) 66 P & CR 475, Lands Tribunal; *Re Bewick's Application* (1996) 73 P & CR 240, Lands Tribunal.

8 Law of Property Act 1925 s 84(1A)(b) (added by the Law of Property Act 1969 s 28(1)(b), (2)). See *Re Fisher & Gimson (Builders) Ltd's Application* (1992) 65 P & CR 312, Lands Tribunal (restrictions in impeding reasonable use contrary to the public interest in that if they were enforced there was a real risk that important housing accommodation would be ordered to be demolished); *Re Hounslow & Ealing London Borough Council's Application* (1995) 71 P & CR 100, Lands Tribunal.

9 Law of Property Act 1925 s 84(1A) (as added: see note 5 supra). See *Re Edwards' Application* (1983) 47 P & CR 458, Lands Tribunal; *Re Livingstones' Application* (1982) 47 P & CR 462, Lands Tribunal; *Re Da Costa's Application* (1986) 52 P & CR 99, Lands Tribunal (money sufficient compensation); *Re London Borough of Islington's Application* [1986] JPL 214 (loss could be covered by a money payment); *Re Williams' Application* (1987) 55 P & CR 400, Lands Tribunal (compensation not adequate recompense); *Re Azfar's Application* [2002] 1 P & CR 215, Lands Tribunal (money not adequate compensation).

10 Law of Property Act 1925 s 84(1)(b); and see *Re Fettishaw's Application (No 2)* (1973) 27 P & CR 292.

11 Law of Property Act 1925 s 84(1)(c). For examples of orders of the Lands Tribunal made on the ground (inter alia) that injury to the persons entitled to the benefit of the restriction would not result see *Re Hall & Co Ltd's Application* (1955) 7 P & CR 159, Lands Tribunal (modification or restriction to permit excavation of sand); *Re Willis (Cinderella Shoes) Ltd's Application* (1955) 165 Estates Gazette 655, Lands Tribunal (modification to permit addition to factory); *Re Goater's Application* (1953) 162 Estates Gazette 174, Lands Tribunal (modification to permit erection of shops where covenant sanctioned only dwelling houses); *Re Nos 53 and 55 Shortlands Road, Kingston-on-Thames* (1954) 163 Estates Gazette 479 (modification to permit light industrial uses); *Re Bowden's Application* (1983) 47 P & CR 455, Lands Tribunal; *Re Richard's Application* (1983) 47 P & CR 467, Lands Tribunal; *Re Farmiloe's Application* (1983) 48 P & CR 317, Lands Tribunal; *Re Cox's Application* (1985) 51 P & CR 335, Lands Tribunal (limitation to domestic staff accommodation altered to person employed in agriculture); *Re Bennett's and Tamarlin Ltd's Application* (1987) 54 P & CR 378, Lands Tribunal (only loss to objector loss of a bargaining position). Modification was refused in *Re Land at Canford Cliffs, Poole* (1953) 103 L Jo 124; *Ridley v Taylor* [1965] 2 All ER 51, [1965] 1 WLR 611, CA; *Re Mansfield District Council's Application* (1976) 33 P & CR 141, Lands Tribunal; *Re Osborn's and Easton's Application* (1978) 38 P & CR 251, Lands Tribunal; *Re Bushell's Application* (1987) 54 P & CR 386, Lands Tribunal; *Re Diggins' Application (No 2)* [2001] 2 EGLR 163, Lands Tribunal. A covenant entered into with the National Trust not to build on certain land was modified to allow rebuilding and enlargement of an existing house where it was shown that this would not injure the amenities or beauty of the district: *Gee v National Trust for Places of Historic Interest or Natural Beauty* [1966] 1 All ER 954, [1966] 1 WLR 170, CA. For cases involving an agreement under the Town and Country Planning Act 1990 s 106 (as substituted) (planning obligations: see TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) 244 et seq) and predecessor legislation see *Re Martin's Application* (1988) 57 P & CR 119, CA; *Re Jones' and White & Co's Application* (1988) 58 P & CR 512, Lands Tribunal; *Re Quartley's Application* (1989) 58 P & CR 518, Lands Tribunal; *Re Towner's and Goddard's Application* (1989) 58 P & CR 316, Lands Tribunal; *Re Houdret & Co Ltd's Application* (1989) 58 P & CR 310, Lands Tribunal; *Re Whiting's Application* (1988) 58 P & CR 321, Lands Tribunal; *Re Williamson's Application* (1994) 68 P & CR 384, Lands Tribunal (the planning regime and the restrictive agreement regime are separate and not interdependent).

Where planning permission has been granted for a development on land affected by a covenant which has already been substantially breached, and which has been incorporated into the local planning authority's development plan, the covenant may be discharged as obsolete: *Re Kennet Properties' Application* (1996) 72 P & CR 353, [1996] 1 EGLR 163, Lands Tribunal. However the grant of planning permission is merely a circumstance which the Lands Tribunal can and must take into account under s 84(1) (as amended), and no more: *Re Willis's Application* (1997) 76 P & CR 97, Lands Tribunal; and see *Re Williamson's Application* supra.

12 Law of Property Act 1925 s 84(1B) (added by the Law of Property Act 1969 s 28(1)(b), (2)).

13 Landlord and Tenant (War Damage) Act 1939 s 18(2); and see the Lands Tribunal Act 1949 s 1(4) (as amended) (jurisdiction of Lands Tribunal); and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 721. Where any restriction affecting the interest created by the lease is wholly or partially discharged or modified on this additional ground, the same powers may be exercised in relation to any similar restriction affecting the freehold out of which that interest is derived: Landlord and Tenant (War Damage) Act 1939 s 18(3). No application may be made after the buildings have been rendered fit: s 18(1) proviso.

14 Ie those under the Law of Property Act 1925 s 84(1)(aa) (as renumbered and amended: see note 5 supra): see head (2) in the text.

15 *Re Bromor Properties Ltd's Application* (1995) 70 P & CR 569, Lands Tribunal; *Re Lee's Application* (1996) 72 P & CR 439, Lands Tribunal.

16 *Re University of Westminster, University of Westminster v President of the Lands Tribunal* [1998] 3 All ER 1014, [1998] 33 LS Gaz R 33, CA.

## **UPDATE**

### **630-641 Discharge or modification under statutory power**

References to the Lands Tribunal are now to the Upper Tribunal: Law of Property Act 1925 s 84 (further amended by SI 2009/1307).

### **632 Grounds of discharge or modification**

NOTE 11--See also *Winter v Traditional and Contemporary Contracts Ltd* [2007] EWCA Civ 1088, [2008] JPL 1011.

NOTE 15--See also *Dobbin v Redpath* [2007] All ER (D) 15 (May).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(v) Discharge and Modification of Restrictive Covenants/B. DISCHARGE OR MODIFICATION UNDER STATUTORY POWER/ (B) Applications to the Lands Tribunal; Procedure/633. Method of making application.

## (B) APPLICATIONS TO THE LANDS TRIBUNAL; PROCEDURE

### 633. Method of making application.

Any person interested in any land affected by a restriction<sup>1</sup> who wishes to make an application<sup>2</sup> must send to the registrar<sup>3</sup> in duplicate an application which must contain:

- 89 (1) the name and address of the person making the application and, if he is represented, the name, address and profession of the representative;
- 90 (2) the address or description of the land to which the application relates;
- 91 (3) the address or description of the land which is subject to the restriction;
- 92 (4) the address or description of the land which, and the identity of any person (if known) who, has the benefit of the restriction or any person whom the applicant believes may have such benefit and the reasons for that belief;
- 93 (5) the statutory ground or grounds<sup>4</sup> on which the applicant relies and the reason he considers that that ground or those grounds apply;
- 94 (6) a statement as to whether the applicant is applying to discharge the restriction wholly or for its modification, and if the latter the extent of the modification;
- 95 (7) a statement as to whether any planning permission has been applied for, granted or refused within the five years preceding the application in respect of the land the subject of the application;
- 96 (8) the signature of the person making the application or his representative and the date of the signature<sup>5</sup>.

The application must be accompanied by:

- 97 (a) a copy of the instrument imposing the restriction or, if this is not available, documentary evidence of the restriction;
- 98 (b) a plan identifying the land to which the application relates and, so far as practicable, all the land subject to the restriction and the land which has the benefit of the restriction<sup>6</sup>.

An application may be made jointly by two or more persons whether the land in which they are interested is the same land or different parts of the land affected by the restriction<sup>7</sup>.

The Lands Tribunal Rules 1996<sup>8</sup> do not contain any provision that would enable an application to be amended so as to include within it a further restriction, in order to avoid a second substantive application<sup>9</sup>.

1 For these purposes, unless the context otherwise requires, 'restriction' means a restriction, arising under a covenant or otherwise, as to the user of or building on any freehold land or any leasehold land held for a term of more than 40 years of which at least 25 years have expired: Lands Tribunal Rules 1996, SI 1996/1022, r 12.

2 ie under the Law of Property Act 1925 s 84 (as amended): see PARA 630 et seq ante, para 634 et seq post.



3 For these purposes, 'the registrar' means the registrar of the Lands Tribunal or, as respects any powers or functions of the registrar, an officer of the Lands Tribunal authorised by the Lord Chancellor to exercise those powers or functions: Lands Tribunal Rules 1996, SI 1996/1022, r 2(1). As to the constitution of the Lands Tribunal and its general procedure see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 720 et seq.

4 le the ground or grounds in the Law of Property Act 1925 s 84 (as amended): see PARA 632 ante.

5 Lands Tribunal Rules 1996, SI 1996/1022, r 13(1).

6 Ibid r 13(2).

7 Ibid r 13(3). An application for the discharge or modification of a covenant may proceed before the Lands Tribunal even if proceedings have been issued claiming forfeiture and possession for an alleged breach of the same covenant: *Driscoll v Church Comrs for England* [1957] 1 QB 330, [1956] 3 All ER 802, CA.

8 le the Lands Tribunal Rules 1996, SI 1996/1022 (as amended): see the text and notes 1-7 supra; para 634 et seq post; and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 501 et seq.

9 *Re Diggins' Application* [2000] 3 EGLR 87, [2000] 48 EG 121, Lands Tribunal.

## UPDATE

### 630-641 Discharge or modification under statutory power

References to the Lands Tribunal are now to the Upper Tribunal: Law of Property Act 1925 s 84 (further amended by SI 2009/1307).

### 633 Method of making application

NOTE 3--The 'registrar' now means the registrar of the Lands Tribunal or, as respects any powers or functions of the registrar, a member of staff appointed under the Tribunals, Courts and Enforcement Act 2007 s 40(1) and authorised by the Senior President of Tribunals to exercise those powers or functions: SI 1996/1022 r 2(1) (amended by SI 2009/1307). As to the delegation of staff, see SI 1996/1022 r 2A.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(v) Discharge and Modification of Restrictive Covenants/B. DISCHARGE OR MODIFICATION UNDER STATUTORY POWER/ (B) Applications to the Lands Tribunal; Procedure/634. Publication of notices.

### **634. Publication of notices.**

Before making any order<sup>1</sup>, the Lands Tribunal must direct such notices, if any, whether by way of advertisement or otherwise, to be given to such of the persons who appear to be entitled to the benefit of the restriction intended to be discharged, modified, or dealt with as, having regard to any inquiries, notices or other proceedings previously made, given or taken, the Tribunal may think fit<sup>2</sup>.

Upon receipt of an application, the registrar<sup>3</sup> must determine what notices<sup>4</sup> are to be given, and whether these should be given by advertisement or otherwise, to persons who appear to be entitled to the benefit of the restriction<sup>5</sup> and may for this purpose require the applicant to provide any documents or information which it is within his power to provide<sup>6</sup>. The notices to be given as determined by the registrar must be given by the applicant who must certify in writing to the registrar that directions as to the giving of those notices have been complied with<sup>7</sup>.

If at any time before the determination of the application it appears to the Tribunal<sup>8</sup> that any person who has not received notice of the application otherwise than by advertisement should have received specific notice, the Tribunal may require the applicant to give notice to that person and may adjourn the hearing to enable that person to make an objection or a claim for compensation<sup>9</sup>.

1    le under the Law of Property Act 1925 s 84 (as amended): see PARA 630 et seq ante, para 635 et seq post.

2    Ibid s 84(3) (amended by the Law of Property Act 1969 s 28(1), (5)). As to the application of the Law of Property Act 1925 s 84 (as amended) see PARAS 630 note 8, 631 ante.

3    For the meaning of 'the registrar' see PARA 633 note 3 ante.

4    The notices must require persons claiming to be entitled to the benefit of the restriction, who object to the discharge or modification of it proposed by the application, or who claim compensation for such modification or discharge, to send to the registrar and to the applicant notice of any objections they may have and of the amount of compensation they claim, if any: Lands Tribunal Rules 1996, SI 1996/1022, r 14(3). A notice of objection to the application and a claim for compensation must be in writing and must be sent to the registrar and the applicant within 28 days from the publication of the notices referred to in r 14: r 15(1). As to extension of this time limit see r 35; and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 731. If the registrar requires, the person objecting must submit a statement containing (1) his name and address and if he is represented the name, address and profession of the representative; (2) the basis upon which he claims to be entitled to the benefit of the restriction; (3) any ground of objection; and (4) his signature or that of his representative and the date the statement was signed: r 15(2). For the meaning of 'restriction' see PARA 633 note 1 ante.

5    Ibid r 14(1).

6    Ibid r 14(2).

7    Ibid r 14(4).

8    For these purposes, 'the Tribunal' means the member or members of the Lands Tribunal selected under the Lands Tribunal Act 1949 s 3(2) (see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 720 et seq) to deal with a case: Lands Tribunal Rules 1996, SI 1996/1022, r 2(1).

9    Ibid r 18.

## **UPDATE**

### **630-641 Discharge or modification under statutory power**

References to the Lands Tribunal are now to the Upper Tribunal: Law of Property Act 1925 s 84 (further amended by SI 2009/1307).

### **634 Publication of notices**

NOTE 8--'The Tribunal' now means the 'Upper Tribunal': SI 1996/1022 r 2(1) (amended by SI 2009/1307).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(v) Discharge and Modification of Restrictive Covenants/B. DISCHARGE OR MODIFICATION UNDER STATUTORY POWER/ (B) Applications to the Lands Tribunal; Procedure/635. Inquiries of local authorities etc.

### **635. Inquiries of local authorities etc.**

Before making any order<sup>1</sup>, the Lands Tribunal must direct such inquiries, if any, to be made of any government department or local authority as, having regard to any inquiries, notices or other proceedings previously made, given or taken, the Tribunal may think fit<sup>2</sup>.

If either before or at the hearing of an application the President<sup>3</sup> or the Tribunal<sup>4</sup> considers that inquiries should be made of any local authority within whose area the land affected by the restriction<sup>5</sup> is situated, he or it may direct those inquiries to be made and may adjourn the case until the local authority has replied<sup>6</sup>.

1    Ie under the Law of Property Act 1925 s 84 (as amended): see PARA 630 et seq ante, para 636 et seq post.

2    Ibid s 84(3) (amended by the Law of Property Act 1969 s 28(1), (5)). As to the application of the Law of Property Act 1925 s 84 (as amended) see PARAS 630 note 8, 631 ante.

3    For those purposes 'the President' means the President of the Lands Tribunal or the member appointed under the Lands Tribunal Act 1949 s 2(3) (see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 720) to act for the time being as deputy for the President: Lands Tribunal Rules 1996, SI 1996/1022, r 2(1).

4    For the meaning of 'the Tribunal' for these purposes see PARA 634 note 8 ante.

5    For the meaning of 'restriction' see PARA 633 note 1 ante.

6    Lands Tribunal Rules 1996, SI 1996/1022, r 19.

### **UPDATE**

#### **630-641 Discharge or modification under statutory power**

References to the Lands Tribunal are now to the Upper Tribunal: Law of Property Act 1925 s 84 (further amended by SI 2009/1307).

### **635 Inquiries of local authorities etc**

TEXT AND NOTES 3-6--Definition of 'the President' omitted: SI 1996/1022 r 2(1) (amended by SI 2009/1307). Omit words 'the President or' and 'he or': SI 1996/1022 r 19 (amended by SI 2009/1307).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(v) Discharge and Modification of Restrictive Covenants/B. DISCHARGE OR MODIFICATION UNDER STATUTORY POWER/ (B) Applications to the Lands Tribunal; Procedure/636. Giving of directions.

### **636. Giving of directions.**

On an application to the Lands Tribunal<sup>1</sup> the Tribunal must give any necessary directions as to the persons who are or are not to be admitted, as appearing to be entitled to the benefit of the restriction, to oppose the application<sup>2</sup>. No appeal lies against any such direction<sup>3</sup>.

<sup>1</sup> Under the Law of Property Act 1925 s 84 (as amended): see PARA 630 et seq ante; the text and notes 2-3 infra; and PARA 637 et seq post. As to the application of s 84 (as amended) see PARAS 630 note 8, 631 ante.

<sup>2</sup> Ibid s 84(3A) (added by the Law of Property Act 1969 s 28(1) (b), (6)). The tribunal may listen to the objections of persons who are or may be affected by the discharge or modification of a restriction as well as persons for whose benefit the restriction was made: *Re Green's Application* (1956) 168 Estates Gazette 607, Lands Tribunal.

<sup>3</sup> Law of Property Act 1925 s 84(3A) (as added: see note 2 supra). Where, however, in connection with the admission of persons to oppose the application, there arises a question such as is referred to in s 84(2)(a) or (b) (as amended) (see PARA 641 post), proceedings may be suspended to enable that question to be decided: see PARA 637 post.

### **UPDATE**

#### **630-641 Discharge or modification under statutory power**

References to the Lands Tribunal are now to the Upper Tribunal: Law of Property Act 1925 s 84 (further amended by SI 2009/1307).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(v) Discharge and Modification of Restrictive Covenants/B. DISCHARGE OR MODIFICATION UNDER STATUTORY POWER/ (B) Applications to the Lands Tribunal; Procedure/637. Suspension of proceedings.

### **637. Suspension of proceedings.**

Rules under the Lands Tribunal Act 1949 must make provision whereby, in cases in which there arises on an application<sup>1</sup>, whether or not in connection with the admission of persons to oppose, any specified question<sup>2</sup>, the proceedings on the application can and, if the rules so provide, must be suspended to enable the decision of the court to be obtained on that question by an application<sup>3</sup> to the court, or by means of a case stated by the Lands Tribunal, or otherwise, as may be provided by those rules or by rules of court<sup>4</sup>.

At any time after the registrar<sup>5</sup> has received a notice of objection to the application, the President<sup>6</sup> or the Tribunal<sup>7</sup> of his or its own motion may<sup>8</sup>, and on the application of the applicant or of any person who has given notice of objection must<sup>9</sup>, suspend the proceedings for such time as he or it may consider appropriate to enable an application to be made to the High Court for the determination of such a specified question<sup>10</sup>.

1    Ie under the Law of Property Act 1925 s 84 (as amended): see PARA 630 et seq ante; the text and notes 2-4 infra; and PARA 638 et seq post. As to the application of s 84 (as amended) see PARAS 630 note 8, 631 ante.

2    Ie any such question as is referred to in ibid s 84(2)(a) or (b) (as amended): see PARA 641 post.

3    Ie under ibid s 84(2) (as amended): see PARA 641 post.

4    Ibid s 84(3A) (added by the Law of Property Act 1969 s 28(1)(b), (6)).

5    For the meaning of 'the registrar' see PARA 633 note 3 ante.

6    For the meaning of 'the President' see PARA 635 note 3 ante.

7    For the meaning of 'the Tribunal' for these purposes see PARA 634 note 8 ante.

8    Lands Tribunal Rules 1996, SI 1996/1022, r 16(a).

9    Ibid r 16(b).

10   Ibid r 16. The Lands Tribunal has no discretion under r 16(b) (see the text to note 9 supra) but to suspend proceedings: *Re Girls' Day School Trust (1872)'s Application* [2002] 2 EGLR 89, [2002] 20 EG 227, Lands Tribunal. There is, however, no general rule that the tribunal is bound to abstain from resolving points of law merely because they are said to be difficult: see *Shepherd Homes Ltd v Sandham (No 2)* [1971] 2 All ER 1267 at 1276, [1971] 1 WLR 1062 at 1072 obiter per Megarry J, explaining *Re Purkiss' Application* [1962] 2 All ER 690, [1962] 1 WLR 902, CA.

## **UPDATE**

### **630-641 Discharge or modification under statutory power**

References to the Lands Tribunal are now to the Upper Tribunal: Law of Property Act 1925 s 84 (further amended by SI 2009/1307).

### **637 Suspension of proceedings**

TEXT AND NOTES 5-10--Omit words 'the President or' and 'his or' and 'he or': SI 1996/1022  
r 16 (amended by SI 2009/1307).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(v) Discharge and Modification of Restrictive Covenants/B. DISCHARGE OR MODIFICATION UNDER STATUTORY POWER/ (C) Orders; Compensation/638. Order without hearing etc.

## (C) ORDERS; COMPENSATION

### **638. Order without hearing etc.**

If it appears to the President<sup>1</sup> that, having regard to the applicant's interest in the land, the applicant is not a proper person to make the application, he may dismiss it and must inform the applicant of his reasons for doing so<sup>2</sup>.

Where no notice of objection is received by the registrar<sup>3</sup> within the time allowed<sup>4</sup>, or all objectors have withdrawn their objections before a hearing has taken place, the President may, with the consent of the applicant, determine the application without any hearing<sup>5</sup>.

Where at or after a hearing:

- 99 (1) all objectors have withdrawn their objections; or
- 100 (2) the Tribunal<sup>6</sup> directs that no objector shall be admitted to oppose the application,

the Tribunal may, with the consent of the applicant, determine the application without any further hearing<sup>7</sup>.

1 For the meaning of 'the President' see PARA 635 note 3 ante.

2 Lands Tribunal Rules 1996, SI 1996/1022, r 17(1). It seems that no appeal lies under the Lands Tribunal Act 1949 s 3(4) (as amended) from the President's decision under this power as s 3(4) (as amended) applies only to tribunal decisions: see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 751. As to the propriety of applying within a short time of the date when the covenant was imposed see PARA 631 note 19 ante.

3 For the meaning of 'the registrar' see PARA 633 note 3 ante.

4 As to the time allowed see PARA 634 note 4 ante.

5 Lands Tribunal Rules 1996, SI 1996/1022, r 17(2).

6 For the meaning of 'the Tribunal' for these purposes see PARA 634 note 8 ante.

7 Lands Tribunal Rules 1996, SI 1996/1022, r 17(3).

## **UPDATE**

### **630-641 Discharge or modification under statutory power**

References to the Lands Tribunal are now to the Upper Tribunal: Law of Property Act 1925 s 84 (further amended by SI 2009/1307).

### **638 Order without hearing etc**



TEXT AND NOTES 1-5--In both places for 'President' read 'Tribunal', for 'he' read 'the Tribunal' and for 'his' read 'its': SI 1996/1022 r 17(1), (2) (amended by SI 2009/1307). As to the definition of 'the Tribunal' see PARA 634 NOTE 8.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(v) Discharge and Modification of Restrictive Covenants/B. DISCHARGE OR MODIFICATION UNDER STATUTORY POWER/ (C) Orders; Compensation/639. Compensation.

### 639. Compensation.

An order discharging or modifying a restriction<sup>1</sup> may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of compensation as the Lands Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either:

- 101 (1) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification<sup>2</sup>; or
- 102 (2) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it<sup>3</sup>.

No payment may, however, be ordered merely by reason of any advantage accruing to the owner of the land affected by the restriction<sup>4</sup>, nor where depreciation in the objector's property occurred long before the application to the tribunal<sup>5</sup>.

Where covenants were discharged or modified so as to permit proposed residential development, objectors owning properties built as a consequence of earlier modifications were not awarded any compensation<sup>6</sup>.

1    le an order under the Law of Property Act 1925 s 84(1) (as amended): see PARAS 630, 632 ante.

2    See *Re Cotterell's Application* (1974) 229 Estates Gazette 1892, Lands Tribunal (compensation for increased use of driveway and for loss of outlook); *Stockport Metropolitan Borough Council v Alwiyah Developments* (1986) 52 P & CR 278, CA. The loss or disadvantage is an intangible matter which is incapable of exact calculation in money: *SJC Construction Co Ltd v Sutton* (1975) 29 P & CR 322, CA (no error of law in giving half realisable development value); *Re Kershaw's Application* (1975) 31 P & CR 187, Lands Tribunal (measure of compensation which objectors, as reasonable persons, would have accepted in friendly negotiations); *Re EMI Social Centres Ltd's Application* (1979) 39 P & CR 421, Lands Tribunal (loss irrecoverable where it derived not from the modification permitted by the tribunal but from the very exercise by the tribunal of its statutory power); *Re Doig's Application* (1980) 41 P & CR 261, Lands Tribunal; and see *Moody v Vercan Ltd* [1991] 2 EGLR 288, CA.

3    Law of Property Act 1925 s 84(1) (amended by the Law of Property Act 1969 s 28(1)(b), (3) and using the term 'consideration' instead of 'compensation'). As to the application of the Law of Property Act 1925 s 84 (as amended) see PARAS 630 note 8, 631 ante. The provision is not designed to enable a person to expropriate the private rights of another purely for his own profit: *Re Henderson's Conveyance* [1940] Ch 835 at 846, [1940] 4 All ER 1 at 7. See *Re Bowden's Application* (1983) 47 P & CR 455, Lands Tribunal; *Re Richards' Application* (1983) 47 P & CR 467, Lands Tribunal; *Re Harper's Application* (1986) 52 P & CR 104, Lands Tribunal; *Carl Paul Developments (Jersey) Ltd's Application* [1994] RVR 13, Lands Tribunal (residual method of valuation preferred to valuation by price per plot); *Re Davies' Application* [2001] EGLR 111, [2001] 03 EG 134, Lands Tribunal.

4    *Re Knott's Application* (1953) 7 P & CR 100, Lands Tribunal (conversion of building in Berkeley Square, London, from a dwelling house into offices greatly increased value of building; no compensation to owner of offices next door); *Re Vaizey's Application* (1974) 231 Estates Gazette 1427, Lands Tribunal (no compensation for share in development value).

5    *Re London Road, East Grinstead* (1953) 103 L Jo 400, Lands Tribunal.

6    *Re Kennet Properties Ltd's Application* [1996] 2 EGLR 163, [1996] 45 EG 139, Lands Tribunal.

**UPDATE**

**630-641 Discharge or modification under statutory power**

References to the Lands Tribunal are now to the Upper Tribunal: Law of Property Act 1925 s 84 (further amended by SI 2009/1307).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(v) Discharge and Modification of Restrictive Covenants/B. DISCHARGE OR MODIFICATION UNDER STATUTORY POWER/ (C) Orders; Compensation/640. Effect of the order.

## **640. Effect of the order.**

A decision of the Lands Tribunal is final, subject to a right of appeal on a point of law<sup>1</sup>. Any order made under the statutory power of discharging and modifying restrictive covenants<sup>2</sup> is binding on all persons, whether ascertained or of full age or capacity or not, then entitled or thereafter capable of becoming entitled to the benefit of the restriction which is thereby discharged, modified or dealt with, and whether such persons are parties to the proceedings or have been served with notice or not<sup>3</sup>. An order may be made under the statutory power notwithstanding that any instrument which is alleged to impose the restriction intended to be discharged, modified or dealt with may not have been produced to the court or the Lands Tribunal; and the court or the Lands Tribunal may act on such evidence of that instrument as it may think sufficient<sup>4</sup>.

Where the discharge or modification of a restriction<sup>5</sup> is ordered subject to the payment of compensation the discharge or modification does not take effect until the registrar<sup>6</sup> has indorsed on the order that the compensation has been paid<sup>7</sup>.

Costs in proceedings for the discharge or modification of restrictive covenants are in the tribunal's discretion<sup>8</sup>.

1 See the Lands Tribunal Act 1949 s 3(4) (as amended); COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARAS 744, 751, 752; and *Re Purkiss' Application* [1962] 2 All ER 690, [1962] 1 WLR 902, CA. An appeal lies on a point of law, not only from an order but from the refusal of the Lands Tribunal to make an order: see *Re No 108 Lancaster Gate and Law of Property Act 1925, Application for Discharge of Restriction* [1933] Ch 419.

2 See under the Law of Property Act 1925 s 84(1) (as amended): see PARA 630 et seq ante.

3 Ibid s 84(5) (amended by the Lands Tribunal Act 1949 s 10(4), Sch 2). As to the application of the Law of Property Act 1925 s 84 (as amended) see PARAS 630 note 8, 631 ante.

4 Ibid s 84(6) (amended by the Law of Property Act 1969 s 28(1)(a)). As to evidence before the tribunal see generally COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARAS 741-743.

5 For the meaning of 'restriction' see PARA 633 note 1 ante.

6 For the meaning of 'the registrar' see PARA 633 note 3 ante.

7 Lands Tribunal Rules 1996, SI 1996/1022, r 20(1). The tribunal may direct that the compensation be paid or satisfied within a specified time, failing which the order is to cease to have effect (r 20(2)) and that any compensation awarded shall be paid into the Court Funds Office of the Supreme Court (r 20(3)). As to the Court Funds Office see CIVIL PROCEDURE vol 12 (2009) PARA 1548 et seq.

8 See *Lands Tribunal Practice Directions* (5 April 2001) PARA 19.2. The general rule is that the successful party ought to receive his costs: para 19.3. However, the Tribunal will have regard to all the circumstances, including the conduct of the parties: see PARA 19.2. An objector whose conduct is dilatory, inconclusive and unreasonable may be at risk as to costs: *Re Osborne's Application* (1972) 25 P & CR 212, Lands Tribunal. See further COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARAS 746-748.

## **UPDATE**

### **630-641 Discharge or modification under statutory power**

References to the Lands Tribunal are now to the Upper Tribunal: Law of Property Act 1925 s 84 (further amended by SI 2009/1307).

**640 Effect of the order**

TEXT AND NOTE 1--Lands Tribunal Act 1949 s 3(4) repealed: SI 2009/1307.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(3) RESTRICTIVE COVENANTS/(v) Discharge and Modification of Restrictive Covenants/B. DISCHARGE OR MODIFICATION UNDER STATUTORY POWER/(D) Jurisdiction of the Court/641. Jurisdiction of the court.

## (D) JURISDICTION OF THE COURT

### 641. Jurisdiction of the court.

The jurisdiction of the Lands Tribunal in respect of the discharge or modification of restrictive covenants is without prejudice to any concurrent jurisdiction of the court<sup>1</sup>; but, where any proceedings<sup>2</sup> are taken to enforce a restrictive covenant, the person against whom the proceedings are taken may in such proceedings apply to the court for an order giving leave to apply to the Lands Tribunal and staying proceedings in the meantime<sup>3</sup>. Unless it appears that the applicant has no real chance of obtaining from the Lands Tribunal the order which he seeks<sup>4</sup>, or unless the applicant has apparently elected not to proceed with the application<sup>5</sup>, an order giving leave will normally be made, since the modification of covenants is not within the power of the court<sup>6</sup>.

The court has power on the application<sup>7</sup> of any person interested to declare:

- 103 (1) whether or not in any particular case any freehold land<sup>8</sup> is, or would in any given event be, affected by a restriction imposed by any instrument; or
- 104 (2) what, upon the true construction of any instrument purporting to impose a restriction, is the nature and extent<sup>9</sup> of the restriction thereby imposed and whether the same is, or would in any given event be, enforceable and, if so, by whom<sup>10</sup>.

An owner of land seeking a declaration that the land is not affected by a restrictive covenant must clearly establish that the land is not affected by the covenant in question<sup>11</sup>. A declaration that the property is not subject to restrictive covenants has an effect in rem<sup>12</sup>.

1 Law of Property Act 1925 s 84(1) (amended by the Law of Property Act 1969 s 28(1) (a)). As to the application of the Law of Property Act 1925 s 84 (as amended) see PARAS 630 note 8, 631 ante. For these purposes, 'the court' means the High Court or the county court, where those courts respectively have jurisdiction; and all matters within the jurisdiction of the High Court are assigned to the Chancery Division of the court: see s 203(3), (4) (amended by the Courts Act 1971 s 56(4), Sch 11 Pt II). The court should be slow to relieve an applicant of covenants which he has entered into himself: *Ridley v Taylor*[1965] 2 All ER 51 at 55, [1965] 1 WLR 611 at 618, CA, obiter per Harman LJ.

2 le by action or otherwise: Law of Property Act 1925 s 84(9) (amended by the Law of Property Act 1969 s 28(1)(a)). An 'action' is now generally referred to as a 'claim': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

3 Law of Property Act 1925 s 84(9) (as amended: see note 2 supra). See *Tower Hamlets London Borough v Stanton Rubber and Plastics Ltd* [1990] JPL 512, CA. In *Shepherd Homes Ltd v Sandham (No 2)*[1971] 2 All ER 1267, [1971] 1 WLR 1062, a stay of proceedings was ordered to remain in force; cf para 637 ante (suspension of proceedings in the Lands Tribunal to enable an application to be made to the court).

4 It is doubtful whether the Lands Tribunal, under cover of modifying a restrictive covenant, is competent to give in effect no more than a personal licence to one individual, or to say what in future other persons exercising the tribunal's jurisdiction will do: see *Re Ghey and Galton's Application*[1957] 2 QB 650 at 660-661, [1957] 3 All ER 164 at 169, CA, per Lord Evershed MR.

5 See *Chatsworth Estates Co v Fewell*[1931] 1 Ch 224 at 233, 234.

6 *Feilden v Bryne*[1926] Ch 620; *Richardson v Jackson*[1954] 1 All ER 437, [1954] 1 WLR 447. Cf *Holdom v Kidd*[1991] 1 EGLR 57, CA (grant of injunction would not prevent appellants going through with planning appeal or application to the Lands Tribunal, if so advised). An order giving leave and staying proceedings may be made subject to conditions: *Hanning v Gable-Jefferys Properties Ltd*[1965] 1 All ER 924, [1965] 1 WLR 1390. An action (now known as a 'claim': see note 2 supra) in which the plaintiff (now known as 'the claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18) seeks forfeiture for past and continuing breaches of a restrictive covenant is not an action to enforce a restrictive covenant and a stay of proceedings under the Law of Property Act 1925 s 84(9) (as amended: see note 2 supra) cannot be obtained: see *Iveagh v Harris*[1929] 2 Ch 142.

7 As to the commencement of proceedings (which are now started in most cases by the issue of a claim form) see generally CIVIL PROCEDURE vol 11 (2009) PARA 116 et seq. The court should make every effort to see that all persons who may wish to oppose the making of the order have the opportunity of being heard: *Re Sunnyfield*[1932] 1 Ch 79 at 83 per Maugham J; *Re Tiltwood, Sussex, Barrett v Bond*[1978] Ch 269, [1978] 2 All ER 1091.

8 The jurisdiction extends to cases where a restriction affecting leasehold land is within the jurisdiction of the Lands Tribunal under the Law of Property Act 1925 s 84(1), (12) (as amended): see PARA 631 the text to note 22 ante.

9 *Re Endericks' Conveyance, Porter v Fletcher*[1973] 1 All ER 843 (extent of a restriction determined); *Crest Nicholson Residential (South) Ltd v McAllister*[2002] EWHC 2443 (Ch), [2003] 1 All ER 46 (restriction to use as 'a private dwelling house' held to mean restriction to a single dwelling house) applying *Dobbs v Linford*[1953] 1 QB 48, [1952] 2 All ER 827, CA; and distinguishing *Briggs v McCusker*[1996] 2 EGLR 197; and see also *Cala Homes (South) Ltd v Carver*[2003] All ER (D) 242 (Jul) (restriction to use for detached houses to be used as private dwelling houses; held that a block of flats was not a 'detached house'). In *Crest Nicholson Residential (South) Ltd v McAllister* supra it was held that a covenant not to erect a dwelling house unless plans had been approved by the vendor company was discharged by the dissolution of the company more than 30 years earlier when it was too late for it to be restored to the register, distinguishing *Bell v Norman C Ashton Ltd* (1956) 7 P & CR 359 and *Re Beechwood Homes Ltd's Application*[1994] 2 EGLR 178, CA. See also *Jarvis Homes Ltd v Marshall*[2003] All ER (D) 54 (Nov) (court granted declaration that proposed construction and use of road would not be in breach of covenant not to use property or permit it to be used for the erection of more than one dwelling house or for purposes of trade or manufacture).

10 Law of Property Act 1925 s 84(2) (amended by the Law of Property Act 1969 s 28(1)(b), (4)). Declarations were made that land was not affected by covenants in *Re Sunnyfield*[1932] 1 Ch 79 (no one who could enforce the covenants); *Re Freeman-Thomas Indenture, Eastbourne Corp v Tilley*[1957] 1 All ER 532, [1957] 1 WLR 560 (original estate had ceased to exist); *Re Pinewood Estates, Farnborough*[1958] Ch 280, [1957] 2 All ER 517 (no annexation, assignment or building scheme by which the benefit could have passed); *Re Forest Hill, Park Crescent, Roundhay, Leeds, Re Murgatroyd's Conveyance* (1957) 8 P & CR 179 (no evidence of what land was intended to be benefited and no passing of the benefit); and *Re Jeffkins' Indentures*[1965] 1 All ER 608n, [1965] 1 WLR 375 (where the court would not, however, say that the covenants were not enforceable by any person).

Neither the Law of Property Act 1925 s 84(7) (see PARAS 630-631 ante) nor s 84(11) (as amended) (see PARA 631 ante) nor, unless the contrary is expressed, any later enactment providing for s 84 (as amended) not to apply to any restrictions affects the operation of s 84(2) (as so amended) or the operation for purposes of s 84(2) (as so amended) of any other provisions of s 84 (as amended): s 84(2) (as so amended).

The court may also decide a future question as to the enforceability of a covenant under its general jurisdiction: *Re Gadd's Land Transfer, Cornmill Developments Ltd v Bridle Lane (Estates) Ltd*[1966] Ch 56, [1965] 2 All ER 800.

The general rule as to costs is that an applicant must pay his own costs and also the costs of any defendants who enter an appearance down to the point when they can decide whether or not to oppose the application: see *Re Jeffkins' Indentures* supra; *Re Wembley Park Estate Co Ltd's Transfer, London Sephardi Trust v Baker*[1968] Ch 491, [1968] 1 All ER 457. Cf *Re Jeffs' Transfer, Rogers v Astley*[1965] 2 All ER 798n, [1965] 1 WLR 972; *Re Jeffs' Transfer, Rogers v Astley (No 2)*[1966] 1 All ER 937, [1966] 1 WLR 841 (general rule did not apply). The jurisdiction under the Law of Property Act 1925 s 84(2) (as so amended) is purely declaratory and, unlike s 84(1) (as amended), contains no reference to consent by conduct: *Griffiths v Band* (1974) 29 P & CR 243; and see *Re Fettishaw's Application (No 2)* (1973) 27 P & CR 292; and PARA 632 ante.

11 *Re 6, 8, 10 and 12 Elm Avenue, New Milton, ex p New Forest District Council*[1984] 3 All ER 632, [1984] 1 WLR 1398.

12 *Re 6, 8, 10 and 12 Elm Avenue, New Milton, ex p New Forest District Council*[1984] 3 All ER 632 at 638, [1984] 1 WLR 1398 at 1407 per Scott J.

## UPDATE

### 630-641 Discharge or modification under statutory power

References to the Lands Tribunal are now to the Upper Tribunal: Law of Property Act 1925 s 84 (further amended by SI 2009/1307).

#### **641 Jurisdiction of the court**

NOTE 9--*Crest Nicholson*, cited, reversed on different grounds: [2004] EWCA Civ 410, [2004] 2 All ER 991n.

NOTE 10--See also *University of East London Higher Education Corp v Barking and Dagenham LBC* [2004] EWHC 2908 (Ch), [2005] 2 WLR 1334.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(4) EQUITABLE ASSIGNMENTS/642. Assignments permitted in equity.

## (4) EQUITABLE ASSIGNMENTS

### 642. Assignments permitted in equity.

It was the policy of the common law that no mere possibility or contingent right or title or chose in action should be assigned, since this might lead to litigation<sup>1</sup>; but the validity of the reason was not recognised in equity, and assignments were permitted both of contingent interests in real and leasehold estate and of choses in action<sup>2</sup>. This was based partly upon the doctrine that an assignment operates by way of contract, and on this footing it was necessary that there should be valuable consideration to make the contract enforceable<sup>3</sup>. In another view the effect of the assignment was to make the assignor a trustee for the assignee<sup>4</sup>, and this did not require any consideration. The distinction is not now primarily between the presence or absence of consideration, but whether the disposition amounts to an absolute assignment so as to put the assignee in the place of the assignor, in which case it is good, though voluntary<sup>5</sup>; or whether it merely gives a charge on property, in which case it operates by way of contract and requires a valuable consideration to support it<sup>6</sup>. It is doubtful whether equity would recognise a charge on a person's whole estate<sup>7</sup>.

1 *Lampet's Case* (1612) 10 Co Rep 46b at 48a.

2 *Wright v Wright* (1750) 1 Ves Sen 409; and see CHOSSES IN ACTION vol 13 (2009) PARA 14 et seq. With respect to the creation of interests in land by parol, a disposition of an equitable interest or trust subsisting at the time of the disposition must be in writing signed by the person disposing of the same, or by his agent lawfully thereunto authorised in writing, or by will: Law of Property Act 1925 s 53(1)(c). See *Towli v Fourth River Property Co Ltd* (1976) Times, 24 November (oral assignee of contract for sale of land non-suited); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 24.

3 'An assignment always operates by way of agreement or contract; amounting in the consideration of this court to this, that one agrees with another to transfer': *Wright v Wright* (1750) 1 Ves Sen 409 at 412 per Lord Hardwicke LC.

4 See PARA 406 ante; cf *Fulham v M'Carthy* (1848) 1 HL Cas 703.

5 See PARA 610 ante; *Squib v Wyn* (1717) 1 P Wms 378; and *Re Westerton, Public Trustee v Gray* [1919] 2 Ch 104.

6 *Re Earl Lucan, Hardinge v Cobden* (1890) 45 ChD 470.

7 *Syrett v Egerton* [1957] 3 All ER 331, [1957] 1 WLR 1130, DC; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 68.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(4) EQUITABLE ASSIGNMENTS/643. Title under equitable assignment.

### **643. Title under equitable assignment.**

To constitute an equitable assignment of a chose in action no particular form of words is required; an engagement or direction by a debtor to pay out of a specified debt or fund constitutes an equitable assignment, though it does not operate as an assignment of the whole fund or debt. A mere charge on a fund or debt operates as a partial equitable assignment<sup>1</sup>. Notice to the person owing the debt or to the holder of the fund is not necessary to complete the assignee's title<sup>2</sup>; but, if he omits to give such notice, a subsequent assignee who took without notice of the first charge may, by giving notice, obtain priority over him<sup>3</sup>.

1 *Rodick v Gandell* (1852) 1 De GM & G 763 at 777 per Lord Truro LC; *Durham Bros v Robertson* [1898] 1 QB 765 at 769 per Chitty LJ; and see also CHOSSES IN ACTION vol 13 (2009) PARA 24 et seq.

2 *Ward and Pemberton v Duncombe* [1893] AC 369 at 392, HL, per Lord Macnaghten; *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1 at 4, [1942] 1 All ER 404 at 407 per Atkinson J. As to notices of assignment see CHOSSES IN ACTION vol 13 (2009) PARA 40 et seq.

3 *Dearle v Hall* (1828) 3 Russ 1. The principle applies also to equitable interests in land by virtue of statute. The rule applies to competing equitable assignments of a legal chose in action: *Compaq Computers Ltd v Abercorn Group Ltd (t/a Osiris)* [1993] BCLC 602, [1991] BCC 484. A notice of any dealing with an equitable interest in trust property should be in writing: see CHOSSES IN ACTION vol 13 (2009) PARA 46. An equitable assignee of a contractual option is not entitled to exercise that option in his own name so as to bind the grantor: *Warner Bros Records Inc v Rollgreen Ltd* [1976] QB 430, [1975] 2 All ER 105, CA. Observations of Roskill LJ and Sir John Pennycuik in this case have been said to place undue emphasis on the maxim that equity acts in personam: *Three Rivers District Council v Bank of England (Governor and Co)* [1996] QB 292 at 302, [1995] 4 All ER 312 at 321, CA, per Staughton LJ.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(4) EQUITABLE ASSIGNMENTS/644. Chose in action assignable subject to equities.

#### **644. Chose in action assignable subject to equities.**

Sometimes the instrument creating a chose in action makes it assignable by the creditor free from equities between himself and the debtor and the debtor is then bound to pay the assignee even if he has a claim against the assignor which might be used by way of defence or set-off in a claim brought by the assignor<sup>1</sup>. Otherwise, however, an equitable assignment is subject to the rule that the assignee takes subject to all rights of set-off and defences existing between the debtor and the assignor except that, after notice of an assignment of a chose in action, the debtor cannot by payment or otherwise do anything to take away or diminish the assignee's rights as they stood at the time of the notice<sup>2</sup>.

<sup>1</sup> *Re Goy & Co Ltd, Farmer v Goy & Co Ltd* [1900] 2 Ch 149; and see CHOSSES IN ACTION vol 13 (2009) PARA 60 et seq.

<sup>2</sup> *Roxburghe v Cox* (1881) 17 ChD 520 at 526, CA, per James LJ; *Re Brown and Gregory Ltd, Shephard v Brown and Gregory Ltd, Andrews v Brown and Gregory Ltd* [1904] 1 Ch 627; *Muscat v Smith* [2003] EWCA Civ 962, 147 Sol Jo LB 900, [2003] All ER (D) 192 (Jul). In the case of an assignment under the Law of Property Act 1925 s 136(1) priorities fall to be determined as if the assignment had been effected in equity: *Compaq Computers Ltd v Abercorn Group Ltd (t/a Osiris)* [1993] BCLC 602, [1991] BCC 484.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/3. EQUITABLE INTERESTS IN PROPERTY/(4) EQUITABLE ASSIGNMENTS/645-700. Assignment of after-acquired property.

### **645-700. Assignment of after-acquired property.**

An assignment for valuable consideration of property to be afterwards acquired by the assignor, while it operates as a covenant to assign the property when acquired, and the beneficial interest passes as soon as the property is acquired by the assignor<sup>1</sup>, does not take effect solely in contract, but confers an immediate interest on the assignee which is not affected by the assignor becoming bankrupt and obtaining his discharge before the property is acquired<sup>2</sup>.

1 *Collyer v Isaacs* (1881) 19 ChD 342, CA; *Tailby v Official Receiver* (1888) 13 App Cas 523, HL; *Re Williams, Richards v Williams* [1930] 2 Ch 378; *Independent Automatic Sales Ltd v Knowles and Foster* [1962] 3 All ER 27 at 36, [1962] 1 WLR 974 at 985; *Elders Pastoral Ltd v Bank of New Zealand (No 2)* [1990] 1 WLR 1478, PC; *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68, [2001] QB 825, [2001] 3 All ER 257. See also PARA 562 ante; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 273.

Where a person has conveyed for value a defective title and afterwards acquires a good title, the good title is available in equity to make the conveyance effectual (*Noel v Bewley* (1829) 3 Sim 103; *Re Bridgwater's Settlement, Partridge v Ward* [1910] 2 Ch 342), provided that the conveyance purports to be of an absolute title in the first instance (*Smith v Osborne* (1857) 6 HL Cas 375 at 398). In *Noel v Bewley* supra this principle was wrongly applied, and that case was overruled by the House of Lords in *Smith v Osborne* supra: see *Re Harper's Settlement, Williams v Harper* [1919] 1 Ch 270 at 275.

2 *Re Lind, Industrials Finance Syndicate Ltd v Lind* [1915] 2 Ch 345, CA (assignment of an expectant share as next of kin); *Re Dent, ex p Trustee* [1923] 1 Ch 113 at 120; *Lloyds TSB Bank plc v Clarke* [2002] UKPC 27, [2002] 2 All ER (Comm) 992, [2003] 1 LRC 590. See further BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 445-448; CHOSSES IN ACTION vol 13 (2009) PARAS 30, 31.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(1) CONVERSION/(i) The Doctrine of Conversion and its Partial Abolition/701. Theoretical conversion of land into money and money into land; the position before 1997.

## **4. EQUITABLE DOCTRINES AFFECTING PROPERTY**

### **(1) CONVERSION**

#### **(i) The Doctrine of Conversion and its Partial Abolition**

#### **701. Theoretical conversion of land into money and money into land; the position before 1997.**

The rule that equity considers that as done which ought to be done gave rise to the doctrine of conversion<sup>1</sup> by means of which land might be impressed with the legal qualities of personal estate, and money might be impressed with the legal qualities of real estate, even though no actual sale or purchase, as the case may be, had taken place. This change of one kind of property into the other might follow from a direction contained in a will or settlement, from a contract<sup>2</sup>, from a court order<sup>3</sup>, or from land becoming subject to a trust for sale by virtue of statute<sup>4</sup>.

The general principle was that land directed or agreed to be sold and turned into money, or money directed or agreed to be laid out in the purchase of land, was to be considered as that species of property into which it was directed or agreed to be converted; thus the owner of the property or the contracting parties might make land money, or money land<sup>5</sup>. It followed that no change was effected where land was directed to be sold and the proceeds reinvested in the purchase of land<sup>6</sup>. The Administration of Estates Act 1925<sup>7</sup>, by establishing a uniform system of intestate succession for real and personal property, greatly diminished the importance of the doctrine of conversion<sup>8</sup>, and it has been further diminished by the Trusts of Land and Appointment of Trustees Act 1996, which partially abolishes the doctrine. The 1996 Act provides that where land is held by trustees subject to a trust for sale, the land is not to be regarded as personal property; and that where personal property is subject to a trust for sale in order that the trustees may acquire land, the personal property is not to be regarded as land<sup>9</sup>. With certain exceptions<sup>10</sup>, this provision applies to a trust whether it is created, or arises, before or after 1 January 1997<sup>11</sup>.

1 See *Lechmere v Earl of Carlisle* (1735) 3 P Wms 211 at 215; *Guidot v Guidot* (1745) 3 Atk 254 at 256; *Trafford v Boehm* (1746) 3 Atk 440; *Hutcheon v Mannington* (1791) 1 Ves 366; *Re Walker, Macintosh-Walker v Walker*[1908] 2 Ch 705 at 712. The doctrine is commonly discussed in terms of land and money but would more accurately be discussed in terms of the conversion of realty to personalty and vice versa. Thus, if money was given to trustees to be laid out in the purchase of land, including both freehold and leasehold, the doctrine did not apply: *Davies v Goodhew* (1834) 6 Sim 585; but see *Re Carrington, Ralphs v Swithenbank*[1932] 1 Ch 1, CA; and PARA 713 note 10 post.

2 See PARA 713 post.

3 See PARA 715 post.

4 See PARA 716 post.

5 *Fletcher v Ashburner* (1779) 1 Bro CC 497 at 499 per Sir T Sewell MR; White & Tud LC (9th Edn) 293; *Wheldale v Partridge* (1800) 5 Ves 388 at 397; affd (1803) 8 Ves 227; and see the early cases collected in the note to *Cruse v Barley* (1727) 3 P Wms 19 at 22.

6 *Sperling v Toll* (1747) 1 Ves Sen 70; *Pearson v Lane* (1809) 17 Ves 101.

7 See the Administration of Estates Act 1925 s 33 as originally enacted (on the death of any person intestate as to any real estate, such estate was held by his personal representatives with the powers of trustees for sale). Section 33 is now amended by the Trusts of Land and Appointment of Trustees Act 1996 s 5, Sch 2 para 5 and by the Trustee Act 2000 s 40(1), Sch 2 Pt II para 27: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 555 et seq.

8 See PARA 712 post.

9 Trusts of Land and Appointment of Trustees Act 1996 s 3(1).

10 For exceptions see PARA 702 post.

11 Trusts of Land and Appointment of Trustees Act 1996 s 3(3).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(1) CONVERSION/(i) The Doctrine of Conversion and its Partial Abolition/702. Conversion since the Trusts of Land and Appointment of Trustees Act 1996.

## **702. Conversion since the Trusts of Land and Appointment of Trustees Act 1996.**

Notwithstanding the somewhat misleading side-note to the relevant provision of the Trusts of Land and Appointment of Trustees Act 1996<sup>1</sup>, 'Abolition of doctrine of conversion', the 1996 Act does not prevent the operation of the doctrine of conversion in the following cases:

- 105 (1) under an order of the court<sup>2</sup>;
- 106 (2) under a contract for the sale of land<sup>3</sup>;
- 107 (3) under an option to purchase<sup>4</sup>;
- 108 (4) in relation to a trust created by a will if the testator died before 1 January 1997<sup>5</sup>;
- 109 (5) where land is held by personal representatives, rather than trustees, if the relevant death occurred before 1 January 1997<sup>6</sup>;
- 110 (6) possibly in the case of partnership property<sup>7</sup>.

Moreover it will still be necessary for some time to know the old law in order to ascertain whether actions before 1 January 1997 were properly taken in cases to which the doctrine of conversion then applied. The doctrine as it applied before 1997<sup>8</sup>, and may in some circumstances still apply, is therefore set out in the succeeding paragraphs.

1 See the Trusts of Land and Appointment of Trustees Act 1996 s 3; and PARA 701 ante.

2 See PARA 715 post.

3 See PARA 713 post.

4 See PARA 714 post.

5 Trusts of Land and Appointment of Trustees Act 1996 s 3(2).

6 Ibid ss 18(3), 25(5).

7 See PARA 717 post.

8 Ie before the Trusts of Land and Appointment of Trustees Act 1996 came into force on 1 January 1997: see the Trusts of Land and Appointment of Trustees Act 1996 (Commencement) Order 1996, SI 1996/2974, art 2.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(1) CONVERSION/(ii) Principles of Doctrine where Conversion may still Apply/703. Direction in will or settlement must be imperative.

## (ii) Principles of Doctrine where Conversion may still Apply

### 703. Direction in will or settlement must be imperative.

Equitable conversion takes place, in the case of a will where the testator died before 1 January 1997<sup>1</sup>, when land is devised upon trust for sale, or money is bequeathed to be laid out in land. Such conversion takes place, in the case of a settlement to which the doctrine of conversion may still apply<sup>2</sup>, when land is conveyed or agreed to be conveyed on trust for sale or when money is paid or agreed to be paid and is to be held upon trust for the purchase of land. In each case, however, the direction to change the nature of the property must be imperative. There is no conversion where there is a mere power<sup>3</sup> to sell land, or to invest money in real estate, or where it is left optional whether an investment of money is to take the form of real or personal estate<sup>4</sup>. Conversion is not effected by a mere declaration that personalty is to devolve as realty, or vice versa. There must be an imperative trust or direction which in equity can be treated as effecting the desired change in the nature of the property<sup>5</sup>. Moreover, the direction to convert must be effectual; if for any reason it is void, there is no conversion<sup>6</sup>.

<sup>1</sup> See PARA 702 ante.

<sup>2</sup> See note 1 supra.

<sup>3</sup> See as distinct from a trust for sale, with power to postpone sale: see the Law of Property Act 1925 s 25(1) as originally enacted. Section 25(1) is now repealed by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4.

<sup>4</sup> *Curling v May* (1734) cited in 3 Atk 254; *Walker v Denne* (1793) 2 Ves 170 at 184; *Wheldale v Partridge* (1800) 5 Ves 388 (affd (1803) 8 Ves 227); *Walter v Maunde* (1815) 19 Ves 424 at 427-428; *De Beauvoir v De Beauvoir* (1852) 3 HL Cas 524; *Smithwick v Smithwick* (1861) 12 I Ch R 181 at 201; *Re Whitty's Trusts* (1875) 9 IR Eq 41; *Re Ibbitson's Estate* (1869) LR 7 Eq 226; *Atwell v Atwell* (1871) LR 13 Eq 23; *Hyett v Mekin* (1884) 25 ChD 735; *Re Hotchkys, Freke v Calmady* (1886) 32 ChD 408, CA; *Re Bird, Pitman v Pitman* [1892] 1 Ch 279; *Re Walker, Macintosh-Walker v Walker* [1908] 2 Ch 705; *Re Newbould, Carter v Newbould* (1913) 110 LT 6, CA (direction to trustees to sell as and when they should think proper held to be a mere power to sell; but probably in a disposition after 31 December 1925 this would be a trust to sell with power to postpone: see PARA 704 the text to note 7 post). If the conversion is directed in a certain event which is ascertained to be existing at the date of the testator's death, the conversion takes effect from the death: *Ward v Arch* (1846) 15 Sim 389; and see *Wall v Colthead* (1858) 2 De G & J 683. A power to sell for the purpose of distribution does not, however, effect a conversion until there is an actual sale (*Lucas v Brandreth* (1860) 28 Beav 273; and see *Brown v Bigg* (1802) 7 Ves 279; *Polley v Seymour* (1837) 2 Y & C Ex 708 at 722); and generally a mere power does not effect a conversion (*De Beauvoir v De Beauvoir* supra).

<sup>5</sup> *Re Walker, Macintosh-Walker v Walker* [1908] 2 Ch 705. To convert money into land it is not sufficient to direct that it shall be held as capital money arising under the Settled Land Act 1925: *Re Aspinall's Settled Estates, Aspinall v Aspinall* [1916] 1 Ch 15; *Re Twopeny's Settlement, Monro v Twopeny* [1924] 1 Ch 522, CA; cf *Edwards v Tuck* (1856) 23 Beav 268; *Hyett v Mekin* (1884) 25 ChD 735. Formerly, to deprive the heir of his rights under an intestacy, it was necessary that the property should be disposed of in favour of the next of kin, and vice versa. It was not sufficient that the testator directed that the proceeds should be considered to all intents and purposes as personal estate; this was on the assumption that he died testate, and implied no gift in favour of the next of kin: *Robinson v Governors of London Hospital* (1853) 10 Hare 19; *Taylor v Taylor* (1853) 3 De GM & G 190. As to capital money arising under the Settled Land Act 1925 being treated as land see s 75(5); and SETTLEMENTS vol 42 (Reissue) PARA 826; cf s 117(1)(ix) (as amended) (meaning of 'land': see SETTLEMENTS vol 42 (Reissue) PARA 680 note 1); *Re Kempthorne, Charles v Kempthorne* [1930] 1 Ch 268, CA. As to disentailed money see the Fines and Recoveries Act 1833 s 71 (as amended); *Re Dickson's Settled Estates* [1921] 2 Ch 108, CA; and REAL PROPERTY vol 39(2) (Reissue) PARA 123.



6     *Re Appleby, Walker v Lever, Walker v Nisbet*[1903] 1 Ch 565, CA.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(1) CONVERSION/(ii) Principles of Doctrine where Conversion may still Apply/704. Direction to convert need not be express.

#### **704. Direction to convert need not be express.**

In cases in which the doctrine of conversion may still apply<sup>1</sup>, it is not essential that there should be an express direction to convert the property; it is sufficient if an imperative trust for conversion can be collected from the instrument<sup>2</sup>. Thus, although there may be an apparent option to invest money in land or in personalty, if the limitations applicable to the investment are suitable for real estate only, the money will be treated as converted into realty<sup>3</sup>; and, even though there is a discretionary power to sell the whole or part of land, if there are trusts which require the exercise of the power, or the subsequent trusts are applicable to personalty<sup>4</sup>, there is a conversion<sup>5</sup>. A trust for conversion will be implied where real and personal property is given for division in such a manner as can be effectuated only by sale<sup>6</sup>. Moreover, where a disposition or settlement coming into operation after 31 December 1925 contains a trust either to retain or sell land, the trust was construed, before 1 January 1997, as a trust to sell the land with power to postpone the sale<sup>7</sup>, and operated as an imperative trust for sale in accordance with the established principle that the existence of a power to postpone sale did not prevent conversion taking place<sup>8</sup>.

<sup>1</sup> See PARA 702 ante.

<sup>2</sup> See *Burrell v Baskerfield* (1849) 11 Beav 525.

<sup>3</sup> *Cowley v Hartstonge* (1813) 1 Dow 361; *Johnson v Arnold* (1748) 1 Ves Sen 169; *Earlom v Saunders* (1754) Amb 241; *Cookson v Reay* (1842) 5 Beav 22 (affd sub nom *Cookson v Cookson* (1845) 12 Cl & Fin 121, HL); *Simpson v Ashworth* (1843) 6 Beav 412; *De Beauvoir v De Beauvoir* (1852) 3 HL Cas 524; and see *Evans v Ball* (1882) 47 LT 165, HL. In *Atwell v Atwell* (1871) LR 13 Eq 23, a limitation to 'heirs' was not sufficient to convert money into realty.

<sup>4</sup> *Re Crips, Crips v Todd* (1906) 95 LT 865; *Gresham Life Assurance Society v Crowther* [1915] 1 Ch 214, CA; *Re Johnson, Cowley v Public Trustee* [1915] 1 Ch 435. It is otherwise where the subsequent trusts are appropriate to land: *Re Hotchkys, Freke v Calmady* (1886) 32 ChD 408, CA; *Re White's Settlement, Pitman v White* [1930] 1 Ch 179.

<sup>5</sup> *Ralph v Carrick* (1877) 5 ChD 984 at 996-997 (this point was not discussed on appeal (1879) 11 ChD 873, CA); and see *Grievson v Kirsopp* (1838) 2 Keen 653.

<sup>6</sup> *Mower v Orr* (1849) 7 Hare 473; and see *Cornick v Pearce* (1848) 7 Hare 477; *Greenway v Greenway* (1860) 2 De G F & J 128.

<sup>7</sup> See the Law of Property Act 1925 s 25(4) (now repealed by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4). As to the effect of such a trust before 1 January 1926 see *Re Johnson, Cowley v Public Trustee* [1915] 1 Ch 435; *Re White's Settlement, Pitman v White* [1930] 1 Ch 179.

<sup>8</sup> *Re Raw, Morris v Griffiths* (1884) 26 ChD 601; *Gresham Life Assurance Society v Crowther* [1915] 1 Ch 214, CA; *Duke of Marlborough v A-G* as reported in [1945] 1 All ER 165, CA.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(1) CONVERSION/(ii) Principles of Doctrine where Conversion may still Apply/705. Conversion at request.

## 705. Conversion at request.

Where there is a trust for conversion at the request of a specified person, the request has been generally treated, not as a condition of conversion, but as intended to secure the performance of the trust, and the trust is imperative and operates at once to effect a conversion<sup>1</sup>; and similarly where a specified consent or approbation is required<sup>2</sup>. A trust for sale is none the less such because it is exercisable at the request or with the consent of any person<sup>3</sup>.

<sup>1</sup> *Thornton v Hawley* (1804) 10 Ves 129; *Burrell v Baskerfield* (1849) 11 Beav 525; *A-G v Dodd* [1894] 2 QB 150.

<sup>2</sup> *Lechmere v Earl of Carlisle* (1735) 3 P Wms 211 at 220; *Wrightson v Macaulay* (1845) 4 Hare 487 at 497; *Rainy v Ellis* (1872) 27 LT 463; *Re Wagstaff's Settled Estates* [1909] 2 Ch 201 at 204; *Re Ffennell's Settlement, Re Ffennell's Estate, Wright v Holton* [1918] 1 Ch 91; cf the opposite opinion in *Stead v Newdigate* (1817) 2 Mer 521 at 530. See also *Re Goswell's Trusts* [1915] 2 Ch 106.

<sup>3</sup> See the Law of Property Act 1925 s 205(1)(xxix) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4) (meaning of 'trust for sale'). Since in a statute the singular includes the plural (Interpretation Act 1978 s 6(c)), the consent required may be that of several persons. Prior to the repeal of the Law of Property Act 1925 s 26(1) by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4, in favour of a purchaser the consent of any two was sufficient. Formerly there was no conversion if the direction was to sell on the joint request of two persons, as of husband and wife (*Re Taylor's Settlement* (1852) 9 Hare 596); or if the language otherwise showed that the consent was essential (see *Davies v Goodhew* (1834) 6 Sim 585, where the sale was to take place with a specified consent, 'and not without'; cf *Huskisson v Lefevre* (1858) 26 Beav 157, 160; *Sykes v Sheard* (1863) 2 De G J & Sm 6), or if the effect was to give a discretion as to the form which the property was to take (*Re Taylor's Settlement* supra at 602).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(1) CONVERSION/(ii) Principles of Doctrine where Conversion may still Apply/706. Effect of conversion.

## 706. Effect of conversion.

Generally<sup>1</sup>, when conversion has once been effected in equity in cases in which the doctrine of conversion may still apply<sup>2</sup>, whether of land into money or of money into land, the property is treated in equity as having all the legal incidents of its new form; and this is so whether the conversion is under a will or a settlement or by statute or otherwise. Consequently land which has been theoretically converted into money will pass as personalty under the beneficiary's will<sup>3</sup> or upon intestacy<sup>4</sup>; and money which has been theoretically converted into land will pass as real estate under the beneficiary's will<sup>5</sup> or upon his intestacy<sup>6</sup>.

If, however, an intention is shown by the will that proceeds of sale of land are included in a devise, or that money to be invested in land is included in a bequest, effect will be given to the intention<sup>7</sup>. Likewise, where the testator has not shown it to be his intention that the property is to be converted and no one other than the testator has a right to call for conversion, property which is actually personalty will pass under a general bequest of personalty<sup>8</sup>.

1 Where, however, the conversion or its consequences depend on statutes, questions of their interpretation may be involved: see *Re Kempthorne, Charles v Kempthorne* [1930] 1 Ch 268, CA; *Earl of Middleton v Cottesloe* [1949] AC 418, [1949] 1 All ER 841, HL; *Cooper v Critchley* [1955] Ch 431, [1955] 1 All ER 520, CA. See also *A-G v Dodd* [1894] 2 QB 150, DC; *A-G v Johnson* [1907] 2 KB 885.

2 See PARA 702 ante.

3 Thus it will pass under a residuary bequest of personalty (*Stead v Newdigate* (1817) 2 Mer 521; *Gover v Davis* (1860) 29 Beav 222) and not under a devise of land (*Elliott v Fisher* (1842) 12 Sim 505).

4 *Ashby v Palmer* (1816) 1 Mer 296; *Biggs v Andrews* (1832) 5 Sim 424 (where part of the land had not been sold); *Griffith v Ricketts*, *Griffith v Lunell* (1849) 7 Hare 299.

5 Thus it will pass under a general devise of land or of real estate (*Greenhill v Greenhill* (1711) 2 Vern 679; *Lingen v Sowray* (1715) 1 P Wms 172; *Guidot v Guidot* (1745) 3 Atk 254; *Rashleigh v Master* (1790) 1 Ves 201; *Biddulph v Biddulph* (1806) 12 Ves 161; *Green v Stephens* (1810) 17 Ves 64 at 77; *Re Duke of Cleveland's Settled Estates* [1893] 3 Ch 244, CA) but will not pass under a bequest of personal estate (*Gillies v Longlands* (1851) 4 De G & Sm 372) or of money (*Re Greaves' Settlement Trusts* (1883) 23 ChD 313). See also *Sweetapple v Bindon* (1705) 2 Vern 536 (tenancy by the curtesy applicable to realty only). Where the trust is for investment in land generally, the money will not pass under a devise of land in a particular county: *Re Duke of Cleveland's Settled Estates* [1893] 3 Ch 244, CA. A direction to resettle 'hereditaments' which are already subject to a settlement extends to money held upon trust under the settlement for investment in land: *Basset v St Levan* (1894) 43 WR 165; *Re Gosselin, Gosselin v Gosselin* [1906] 1 Ch 120.

6 *Lingen v Sowray* (1715) 1 P Wms 172; *Disher v Disher* (1712) 1 P Wms 204; *Chaplin v Horner* (1718) 1 P Wms 483; *Scudamore v Scudamore* (1720) Prec Ch 543; *Edwards v Countess of Warwick* (1723) 2 P Wms 171 (affd sub nom *Countess of Warwick v Edwards* (1723) 1 Bro Parl Cas 207); and see *Knights v Atkyns* (1687) 2 Vern 20. Where the money was to be paid by the ancestor, and before his death the trusts which required investment in land were exhausted, a different principle came in; the money was 'at home' in the lifetime of the ancestor, and the heir's equity to take it as land did not arise: see PARA 722 post.

7 Thus, if in his will a testator describes a fund as so much money agreed to be laid out in land, it will pass as personal estate: *Cross v Addenbroke* (1719) cited in the note to *Lechmere v Earl of Carlisle* (1735) 3 P Wms 211 at 222. It has been held, however, that a devise by B of a share in a specific estate taken by him under A's will will not pass the share if, under A's will, it was converted (*Elliott v Fisher* (1842) 12 Sim 505); sed quaere. See also *Re Pedder's Settlement* (1854) 5 De GM & G 890.

The effect of the conversion of money into land and vice versa was formerly important in regard to the liability of the property to debts of the deceased beneficiary (*Whitwick v Jermin* (prior to 1688) cited in *Baden v Earl of Pembroke* (1688) 2 Vern 52 at 58), but, now that land is liable for both specialty and simple contract debts, the result of conversion is not important. The Intestates Estates Act 1884 s 4 (repealed) appears to have similarly abolished the old rule that the court would not treat money as land where the Crown would take by escheat: *Walker v Denne* (1793) 2 Ves 170 at 185; *Henchman v A-G* (1834) 3 My & K 485 at 494; and see *Taylor v Haygarth* (1844) 14 Sim 8. Money which would, as such, have been forfeitable, prior to the Forfeiture Act 1870, to the Crown on conviction of felony (*Talbot v Jevers* [1917] 2 Ch 363, CA) was, however, saved by a theoretical conversion into land: *Re Harrop's Estate* (1857) 3 Drew 726.

8 *Chandler v Pocock* (1880) 15 ChD 491 (affd (1881) 16 ChD 648, CA); *Re Harman, Lloyd v Tardy* (1894) 3 Ch 607; and see *Wrightson v Macaulay* (1845) 4 Hare 487 (on appeal (1847) 17 LJ Ch 54); *Re Upton-Cottrell-Dormer, Upton v Upton* (1915) 84 LJ Ch 861. Where property which is given under a power of appointment has changed its condition by the time of the testator's death, the wording of the testator's will may not be sufficiently wide to pass the property in its new state: *Adams v Austen* (1829) 3 Russ 461; *Gale v Gale* (1856) 21 Beav 349; *Blake v Blake* (1880) 15 ChD 481.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(1) CONVERSION/(ii) Principles of Doctrine where Conversion may still Apply/707. Doctrine of conversion and statutory provisions.

## **707. Doctrine of conversion and statutory provisions.**

Where there is a trust for sale of land<sup>1</sup>, the interest of the beneficiaries may, notwithstanding the doctrine of conversion, still be an interest in land for the purpose of particular statutory provisions. It is necessary to look at the particular Act and to see whether in the context of that Act an expression such as 'interest in land' is or is not apt to cover an interest in the proceeds of sale of land<sup>2</sup>.

1 Since 1 January 1997, a trust for sale of land is now generally a 'trust of land': see the Trusts of Land and Appointment of Trustees Act 1996 s 1; and REAL PROPERTY vol 39(2) (Reissue) PARA 66.

2 *Elias v Mitchell* [1972] Ch 652 at 664, [1972] 2 All ER 153 at 159 per Pennycuik V-C.

The interest of a beneficiary under a trust for sale of land has been held to be an interest in land entitling him to lodge a caution under the Land Registration Act 1925 s 54 (repealed): *Elias v Mitchell* supra. It was also held to be an interest in land for the purposes of the Law of Property Act 1925 s 63: *Ahmed v Kendrick* (1987) 56 P & CR 120, CA. In the light of this decision and dicta in *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487, [1980] 2 All ER 408, HL, the contrary decision in *Cedar Holdings Ltd v Green* [1981] Ch 129, [1979] 3 All ER 117, CA no longer represents the law. An interest under a trust for sale of land was also an interest in land within the Law of Property Act 1925 s 40 (repealed): see now the Law of Property (Miscellaneous Provisions) Act 1989 s 2(6) (as amended) ('interest in land' means any estate, interest or charge in or over land). It was held not to be an interest in land for the purpose of making a charging order under the Administration of Justice Act 1956 s 35 (repealed) (see *Irani Finance Ltd v Singh* [1971] Ch 59, [1970] 3 All ER 199, CA); but see now the Charging Orders Act 1979 s 2; *National Westminster Bank Ltd v Stockman* [1981] 1 All ER 800, [1981] 1 WLR 67 (judgment creditor entitled to have charging order imposed on judgment debtor's beneficial interest in house held under trust for sale); and CIVIL PROCEDURE vol 12 (2009) PARA 1468. See also *Harman v Glencross* [1986] Fam 81, [1986] 1 All ER 545, CA; *Perry v Phoenix Assurance plc* [1988] 3 All ER 60, [1988] 1 WLR 940. An interest under a trust for sale of land might be an interest 'subsisting in reference' to land under the Land Registration Act 1925 s 70(1) (repealed): *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487, [1980] 2 All ER 408, HL.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(1) CONVERSION/(ii) Principles of Doctrine where Conversion may still Apply/708. Date of conversion.

### 708. Date of conversion.

In cases in which the doctrine of conversion may still apply<sup>1</sup>, the rules as to the date of conversion are as follows. In the case of conversion directed by will, the conversion takes place from the death of the testator<sup>2</sup>; where it is directed by deed, from the delivery of the deed<sup>3</sup>; and this is so even where a period is expressly fixed within which the sale is to be made<sup>4</sup>, or where the trustees are directed to sell when it appears advantageous<sup>5</sup> or when a sale is for the beneficiary's benefit<sup>6</sup>; or even where the sale is not to take place until the happening of a future event<sup>7</sup> such as the death of a tenant for life<sup>8</sup>. If, however, the future event is contingent, the conversion does not take place until the contingency is ascertained<sup>9</sup>. In the event of a postponement of the actual sale of land after the time when it is to be deemed to take place, the intermediate rents and profits go to the person entitled to the income of the proceeds of sale<sup>10</sup>.

1 See PARA 702 ante.

2 *Lord Beauclerk v Mead* (1741) 2 Atk 167; *Hutcheon v Mannington* (1791) 1 Ves 366. Hence actual conversion gives no fresh title to the proceeds of land as personalty: *Re Bacon, Toovey v Turner* [1907] 1 Ch 475 at 481. As to a power to postpone conversion see *Re Sherry, Sherry v Sherry* [1913] 2 Ch 508; *Re Kipping, Kipping v Kipping* [1914] 1 Ch 62; *Re Marshall, Marshall v Marshall* [1914] 1 Ch 192, CA.

3 *Griffith v Ricketts, Griffith v Lunell* (1849) 7 Hare 299 at 311; *Clarke v Franklin* (1858) 4 K & J 257 at 263. It is otherwise if the deed shows an intention that the property shall remain in its existing state until a future event: *Wheldale v Partridge* (1803) 8 Ves 227 at 236.

4 *Pearce v Gardner* (1852) 10 Hare 287.

5 *Robinson v Robinson* (1854) 19 Beav 494.

6 *Doughty v Bull* (1725) 2 P Wms 320; *Re Raw, Morris v Griffiths* (1884) 26 ChD 601.

7 *Tily v Smith* (1844) 1 Coll 434.

8 *Clarke v Franklin* (1858) 4 K & J 257; *Stead v Newdigate* (1817) 2 Mer 521.

9 *Ward v Arch* (1846) 15 Sim 389.

10 *Fitzgerald v Jervoise* (1820) 5 Madd 25.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(1) CONVERSION/(ii) Principles of Doctrine where Conversion may still Apply/709. Conversion of minor's property.

### 709. Conversion of minor's property.

A court of equity did not, as a rule, allow a minor's<sup>1</sup> realty to be converted into personalty, or personalty into realty<sup>2</sup>, and would not order the sale of a minor's realty even where it would be for his benefit<sup>3</sup>. Accordingly, money in which a minor was interested, if it did not partake of the character of realty, could not lawfully be invested in real property<sup>4</sup>, and if real property in which a minor was interested was lawfully sold, the money arising from the sale was impressed in equity with the character of realty<sup>5</sup>. Where, however, the court directed real property to be sold for the purpose of paying costs, the balance of the proceeds after payment of the costs was treated as personalty, and descended as such<sup>6</sup>. A minor who is interested in property cannot elect to convert its character from personalty into realty or from realty into personalty<sup>7</sup>.

1 A person attains full age on attaining the age of 18: see the Family Law Reform Act 1969 s 1; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 1-2.

2 *Rook v Warth* (1750) 1 Ves Sen 460 at 461 per Lord Hardwicke LC.

3 *Galvert v Godfrey* (1843) 6 Beav 97; *Re De Teissier's Settled Estates, Re De Teissier's Trusts, De Teissier v De Teissier* [1893] 1 Ch 153; but see *Inwood v Twyne* (1762) 2 Eden 148 at 152-153 per Lord Henley LC; *Ex p Grimstone* (1772) Amb 706 at 708; *Robinson v Robinson* (1854) 19 Beav 494.

4 *Gibson v Scudamore* (1726) 1 Dick 45; *Rook v Warth* (1750) 1 Ves Sen 460 at 461 per Lord Hardwicke LC; *Ex p Bromfield* (1792) 3 Bro CC 510 at 516; *Ware v Polhill* (1805) 11 Ves 257 at 278 per Lord Eldon LC. In a suitable case, however, the minor's money has been authorised to be laid out in the purchase of land (*Lord Ashburton v Lady Ashburton* (1801) 6 Ves 6) and, by way of salvage, in the improvement of his real property (*Re Household, Household v Household* (1884) 27 ChD 553; *Conway v Fenton* (1888) 40 ChD 512). Where trustees who have power to sell a minor's real property do not all agree to do so, the court will not order the sale even if it would add to the income of the estate: *Marquis Camden v Murray* (1880) 16 ChD 161.

5 *Rook v Warth* (1750) 1 Ves Sen 460; *Ware v Polhill* (1805) 11 Ves 257 at 278; and see *Howard v Jalland* [1891] WN 210; *Re Norton, Norton v Norton* [1900] 1 Ch 101 (sales in partition actions at request of plaintiffs who were minors).

6 See PARA 715 post.

7 See PARA 720 post.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(1) CONVERSION/(ii) Principles of Doctrine where Conversion may still Apply/710. Total or partial failure of purpose of conversion.

### **710. Total or partial failure of purpose of conversion.**

In cases to which the doctrine of conversion may still apply<sup>1</sup>, the purposes for which a conversion is directed by will may fail either wholly or partially<sup>2</sup>, and then, if the conversion was directed for these purposes only<sup>3</sup>, equity will treat the property, so far as the purposes fail, as reconverted<sup>4</sup>.

When, upon the failure of the purposes for which a conversion was directed by will, the heir or the next of kin, as the case might be, took the property, it sometimes became necessary to ascertain whether it was taken by the one or the other as real or personal estate. The result did not depend upon whether there had been an actual conversion or not, but on whether there had been a total or only a partial failure of the purposes for which conversion was directed. If, before the testator's death, these purposes had wholly failed, the need for conversion had gone; and, if there was an actual conversion, it was improper and could not affect the rights of the heir or the next of kin<sup>5</sup>.

Where there was a total or partial failure of the purposes of a conversion directed by deed, the principle was the same as in the case of a conversion directed by will, but it had to be applied with reference to the time from which the deed operated<sup>6</sup>.

<sup>1</sup> See PARA 702 ante.

<sup>2</sup> The failure of the trusts may be by reason of the death of a legatee or devise in the testator's lifetime (*Ackroyd v Smithson* (1780 1 Bro CC 503), or of a legatee or devisee failing to obtain a vested interest (*Jessopp v Watson* (1833) 1 My & K 665), or of a disposition being illegal, as where it infringes what is now the Law of Property Act 1925 s 164 (see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1119 et seq; *Eyre v Marsden* (1838) 2 Keen 564; *Simmons v Pitt* (1873) 8 Ch App 978; *Re Perkins, Brown v Perkins* (1909) 101 LT 345), or where the surplus of the proceeds of sale is undisposed of (see *Naismith v Boyes* [1899] AC 495 at 501-502, HL). See also *Re Walpole, Public Trustee v Canterbury* [1933] Ch 431.

<sup>3</sup> *Hill v Cock* (1813) 1 Ves & B 173 at 175 per Lord Eldon LC.

<sup>4</sup> Where realty held legally and beneficially by two persons as joint tenants before 1926 was converted by a statutory trust for sale coming into operation under the Law of Property Act 1925 s 36(1) (now amended by the Trusts of Land and Appointment of Trustees Act 1996 s 5, Sch 2 para 3), and one of the two joint tenants died, the statutory trust for sale determined and the property was reconverted: *Re Cook, Beck v Grant* [1948] Ch 212, [1948] 1 All ER 231.

If the property was originally land, equity would formerly give it to the heir-at-law: *Ackroyd v Smithson* (1780) 1 Bro CC 503; 1 White & Tud LC (9th Edn) 327; *Robinson v Taylor* (1789) 2 Bro CC 589; *Chitty v Parker* (1793) 2 Ves 271; *Berry v Usher* (1805) 11 Ves 87; *Roberts v Walker* (1830) 1 Russ & M 752. The principle applied also to money which was in equity theoretically land, and which was subject to a devise on trust for sale: *Re Taylor's Settlement* (1852) 9 Hare 596 at 604. If the property was originally money, equity would give it to the next of kin: *Cogan v Stephens* (1835) 5 LJ Ch 17. Before this case, while it was admitted that personalty directed to be laid out in land resulted to the next of kin on a total failure of the purposes of conversion, it was doubted whether the next of kin would take on a partial failure: see the judgment of Lord Cottenham MR. This was so whether conversion had actually taken place or not (in *Ackroyd v Smithson* supra the land had been sold; cf *Bective v Hodgson* (1864) 10 HL Cas 656 at 667 per Lord Westbury LC) and even if the real and personal estate had been blended so as to form a mixed fund (*Ackroyd v Smithson* supra; White & Tud LC (9th Edn) 327; *Jessopp v Watson* (1833) 1 My & K 665). Where debts and legacies were payable out of the mixed fund, the converted land was to bear its rateable proportion before the reconversion took effect: *Tench v Cheese* (1855) 6 De GM & G 453 at 467; *Allan v Gott* (1872) 7 Ch App 439 at 445.

The testator, foreseeing this result, could avoid it, if he so chose, by directing that the conversion should be not only for the primary purposes of his will but should be absolute, and should prevail as between the heir and the next of kin: 2 Jarman's Treatise on Wills (8th Edn, 1951) p 778; and see the cases collected in the note to *Cruse v Barley* (1727) 3 P Wms 19 at 22. To effect this it was not sufficient, in the case of land directed to be converted, merely to exclude the heir; there had to be an actual gift of the proceeds in favour of the next of kin; and, similarly, in the case of money directed to be laid out in land, to exclude the next of kin, there had to be a gift of the land in favour of the heir: *Fitch v Weber* (1848) 6 Hare 145; and see *Berry v Usher* (1805) 11 Ves 87. Where the income only of the proceeds of sale was disposed of, there was a resulting trust of the capital in favour of the heir (*Wilson v Major* (1805) 11 Ves 205; *Watson v Hayes* (1839) 5 My & Cr 125); and similarly the heir took income which was undisposed of (*Eyre v Marsden* (1838) 2 Keen 564; affd (1839) 4 My & Cr 231; *Re Perkins*, *Brown v Perkins* (1909) 101 LT 345; and see *Re Walpole*, *Public Trustee v Canterbury* [1933] 1 Ch 431).

5 *Davenport v Coltman* (1842) 12 Sim 588 at 610. Hence, in the case of land directed to be turned into money, the heir-at-law took the property, whatever its form, as real estate and, unless otherwise disposed of, it descended to his heir-at-law; and, similarly, in the case of money directed to be laid out in land, the next of kin took it, whatever its form, as personal estate: *Smith v Claxton* (1820) 4 Madd 484 at 493 per Leach V-C; *Bagster v Fackerell* (1859) 26 Beav 469; *Buchanan v Harrison* (1861) 1 John & H 662; *Re Richerson*, *Scales v Heyhoe* [1892] 1 Ch 379 at 382; *Re Hopkinson*, *Dyson v Hopkinson* [1922] 1 Ch 65. If, however, there had been only a partial failure at the testator's death of the purposes for which conversion was directed, the result was different; the trust for conversion became operative, and, although, so far as the purposes failed, land directed to be sold went to the heir-at-law, he took it as personal estate (*Wright v Wright* (1809) 16 Ves 188; *Smith v Claxton* (1820) 4 Madd 484; *Jessopp v Watson* (1833) 1 My & K 665; *Bective v Hodgson* (1864) 10 HL Cas 656 at 667 per Lord Westbury LC; *A-G v Lomas* (1873) LR 9 Exch 29), whether it had been actually sold or not (*Re Richerson*, *Scales v Heyhoe* [1892] 1 Ch 379; *Re O'Connor*, *M'Dermott v A-G (No 2)* [1923] 1 IR 142, CA); and, similarly, money directed to be laid out in land went to the next of kin as real estate, whether land had been actually purchased or not (*Curteis v Wormald* (1878) 10 ChD 172, overruling *Head v Godlee*, *Reynolds v Godlee* (1859) John 536 at 583; and see *Cogan v Stephens* (1835) 5 LJ Ch 17; *Hereford v Ravenhill* (1839) 1 Beav 481).

6 Hence the property not required for the objects stated in the deed resulted to the settlor himself: *Griffith v Ricketts*, *Griffith v Lunell* (1849) 7 Hare 299 at 311. If there was a total failure of the purposes, it resulted to him, in the case of land to be turned into money, as realty, which, if he died without disposing of it, passed to his heir-at-law: *Ripley v Waterworth* (1802) 7 Ves 425 at 435. If there was a partial failure, it resulted to him as personalty: *Hewitt v Wright* (1780) 1 Bro CC 86; *Clarke v Franklin* (1858) 4 K & J 257; and see *Van v Barnett* (1812) 19 Ves 102; *Biggs v Andrews* (1832) 5 Sim 424. Similarly, money directed to be laid out in land resulted to the settlor, on a total failure of the purposes of conversion, as personalty, and on a partial failure, as realty: see *Wheldale v Partridge* (1803) 8 Ves 227 at 236; *Clarke v Franklin* (1858) 4 K & J 257 at 264-265.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(1) CONVERSION/(ii) Principles of Doctrine where Conversion may still Apply/711. Trusts void for remoteness.

### **711. Trusts void for remoteness.**

In cases where the doctrine of conversion may still apply<sup>1</sup>, where there is a valid trust for sale of realty but the trusts of the proceeds of sale fail for remoteness, the property is reconverted and becomes subject to a trust for the heir or person entitled in default of disposition<sup>2</sup>. Where a trust for sale of realty is void for remoteness<sup>3</sup> but the beneficial interests are not void, the trust for sale is disregarded and the beneficiaries take the property as realty<sup>4</sup>.

1 See PARA 702 ante.

2 *Newman v Newman* (1839) 10 Sim 51; *Whitehead v Bennett* (1853) 1 Eq Rep 560; *Hale v Pew* (1858) 25 Beav 335; *Burley v Evelyn* (1848) 16 Sim 290.

3 The rule against perpetuities does not operate to invalidate a power conferred on trustees or other persons to sell, lease, exchange or otherwise dispose of any property for full consideration: see the Perpetuities and Accumulations Act 1964 s 8(1); and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1034. It is uncertain, however, whether this covers an imperative trust for sale: see *Re Hanson*, *Hanson v Eastwood* [1928] Ch 96.

4 *Goodier v Edmunds* (1893) 3 Ch 455; *Re Dameron*, *Bowen v Churchill* [1893] 3 Ch 421; *Re Appleby*, *Walker v Lever*, *Walker v Nisbet* [1903] 1 Ch 565, CA; and see the cases cited in note 2 supra. See also *Re Garnham*, *Taylor v Baker* [1916] 2 Ch 413.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(1) CONVERSION/(ii) Principles of Doctrine where Conversion may still Apply/712. Death after 31 December 1925.

## **712. Death after 31 December 1925.**

In the case of a death after 31 December 1925, the undisposed-of property, whether real or personal, of a deceased person is held by his personal representatives. In the case of a death occurring before 1 January 1997, it was held upon trust for sale<sup>1</sup>; in the case of a death occurring on or after that date, it is held with the power to sell it<sup>2</sup>. The persons who take beneficial interests in the property are ascertained by the rules of succession, which apply alike to realty and personalty<sup>3</sup>. It is immaterial whether the undisposed-of property of a testator is realty or personalty, and, in the case of the death of a person after 31 December 1925, the doctrine of conversion, where it still applies<sup>4</sup>, is important only where a testator dies without a reconversion of converted property having been effected and where, by a will made before the conversion, he has left his realty in one way and his personalty in another<sup>5</sup>.

1 See the Administration of Estates Act 1925 s 33(1) (as originally enacted).

2 See *ibid* s 33(1) (substituted by the Trusts of Land and Appointment of Trustees Act 1996 s 5, Sch 2 para 5); and PARAS 701 note 7, 702 ante.

3 See the Administration of Estates Act 1925 s 46 (as amended); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 591 et seq. As to the statutory trust for sale, the distribution of the estate and the statutory trusts in favour of issue on death of an intestate see ss 33, 46, 47 (as amended); and EXECUTORS AND ADMINISTRATORS vol 17(2) PARAS 555 et seq, 591 et seq.

4 See PARA 702 ante.

5 See eg *Re Kempthorne, Charles v Kempthorne* [1930] 1 Ch 268, CA.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(1) CONVERSION/(ii) Principles of Doctrine where Conversion may still Apply/713. Conversion by contract of sale.

### 713. Conversion by contract of sale.

The doctrine of conversion applies where there is an agreement for the sale of land; and from the date when the contract becomes binding the land is treated for the purposes of testamentary disposition and of devolution as personalty<sup>1</sup>. Accordingly, if the vendor has died between contract and completion, any specific devise of the property contained in a will preceding<sup>2</sup> the contract is revoked or adeemed<sup>3</sup>, and the right to receive the purchase money goes to the person entitled to the personal property. On the death of the purchaser between contract and completion, the property correspondingly passes to the person entitled to his real property, though he takes it subject to the liability to pay the whole or the balance of the purchase price, as the case may be<sup>4</sup>. In ordinary cases the signing of the contract marks the date of this conversion<sup>5</sup>.

The doctrine of conversion applies in the ordinary way to a contract imposed by statute<sup>6</sup>, but special considerations arise where land is taken under the Lands Clauses Consolidation Act 1845<sup>7</sup> or the Compulsory Purchase Act 1965 or any Acts modifying those Acts. Where land is so taken, the notice to treat does not create a contract<sup>8</sup>; but, as soon as the purchase price has been ascertained, whether by agreement, by arbitration, or otherwise, a contract arises by virtue of the statute<sup>9</sup>. If this is done in the landowner's lifetime, the proceeds of sale pass as personalty, but the rents accruing between his death and completion belong to the successor in title to the land<sup>10</sup>.

1 *Lady Foliam's Case* (1601) cited in *Daire v Beversham* (1661) Nels 76 at 77; *Lawes v Bennett* (1785) 1 Cox Eq Cas 167 at 171; *Farrar v Earl of Winterton* (1842) 5 Beav 1; *A-G v Brunning* (1860) 8 HL Cas 243 at 265; *Hillingdon Estates Co v Stonefield Estates Ltd* [1952] Ch 627 at 632, [1952] 1 All ER 853 at 856 per Vaisey J. Thus, if a valid contract is completed after the death of the vendor, the property was converted at his death (*Lysaght v Edwards* (1876) 2 ChD 499) but there is no conversion where title cannot be made to the property sold (*Re Thomas, Thomas v Howell* (1886) 34 ChD 166).

2 If the will is subsequent to the contract, it is a question of construction whether the disposition therein contained extends to the purchase money: see *Re Calow, Calow v Calow* [1928] Ch 710.

3 Strictly, it seems to be revocation by alteration of estate: see *Andrew v Andrew* (1856) 4 WR 520.

4 See the Administration of Estates Act 1925 s 35; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 424 et seq.

5 See PARA 611 ante. If the heir adopted and carried out an oral contract of his ancestor, this avoided any objection based on the Statute of Frauds (1677), the conversion was complete, and the purchase money belonged to the next of kin (*Frayne v Taylor* (1863) 10 Jur NS 119), but otherwise an unenforceable contract did not effect a conversion (*Re Thomas, Thomas v Howell* (1886) 34 ChD 166; *Re Rix, Steward v Lonsdale* (1921) 90 LJ Ch 474). If, however, the contract was enforceable, but went off after the vendor's death through the purchaser's default, there was conversion: *Curre v Bowyer* (1818) 5 Beav 7n; and see *Broome v Monck* (1805) 10 Ves 597.

6 Eg by the Coal Act 1938 (repealed): see *Re Galway's Will Trusts, Lowther v Galway* [1950] Ch 1, [1949] 2 All ER 419.

7 The Lands Clauses Consolidation Act 1845 has been modified, in particular by the Land Compensation Act 1973: see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 631. Questions may also arise under the Leasehold Reform Act 1967 under which a leaseholder who satisfies certain conditions may convert his interest from leasehold, ie personalty, into freehold, ie realty: see (1969) 33 Conv NS 43, 141.

8 *Haynes v Haynes* (1861) 1 Drew & Sm 426 at 450; and see *Capital Investments Ltd v Wednesfield UDC* [1965] Ch 774 at 794, [1964] 1 All ER 655 at 667.

9 *Harding v Metropolitan Rly Co* (1872) 7 Ch App 154 at 158; and see *Regent's Canal Co v Ware* (1857) 23 Beav 575; *Ex p Walker, Re Shrewsbury and Hereford Rly* (1853) 1 Drew 508; *Re Battersea Park Acts, Re Arnold* (1863) 32 Beav 591; cf *Morgan v Milman* (1853) 3 De GM & G 24.

10 *Ex p Hawkins* (1843) 13 Sim 569; *Re Manchester and Southport Rly Co* (1854) 19 Beav 365; *Watts v Watts* (1873) LR 17 Eq 217. A compulsory sale of settled land does not, however, effect a conversion (*Re Taylor's Settlement* (1852) 9 Hare 596); nor, apparently, of land of a person mentally disordered (*Re Tugwell* (1884) 27 ChD 309; contra *Re Cross's Estate, the Lands Clauses Consolidation Act 1845 and the East Lincolnshire Railway Act, ex p Flamank* (1851) 1 Sim NS 260); nor of land to which a minor is beneficially entitled (*Kelland v Fulford* (1877) 6 ChD 491); unless the purchase money is paid to trustees who are not bound to reinvest it in land (*Re Morgan, Smith v May* [1900] 2 Ch 474).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(1) CONVERSION/(ii) Principles of Doctrine where Conversion may still Apply/714. Conversion on the exercise of an option to purchase conferred by agreement.

#### **714. Conversion on the exercise of an option to purchase conferred by agreement.**

Where an agreement confers an option to purchase, the exercise of the option converts the agreement into an agreement for sale, and the land itself is treated as converted from the date of the exercise of the option<sup>1</sup>. The rule is equally applicable to a conditional contract where the condition is fulfilled or waived after the death<sup>2</sup>. Thus, if the vendor has died in the interval, the proceeds of sale do not belong to his devisee, but pass as personal estate and, in effect, the exercise of the option deprives the devisee of the land without compensation<sup>3</sup>, but he is not required to account for rents and profits received before the time for completion<sup>4</sup>. If there is conversion, it seems to make no difference that the contract is not carried through to completion<sup>5</sup>. The vendor may, however, either in the agreement<sup>6</sup> or in his will, indicate his intention that the owner at the date of the exercise of the option is to take the proceeds of sale; and, where, after the land has been made subject to the option, he specifically devises it, the devise is construed as passing the proceeds of sale if the option is exercised<sup>7</sup>.

1 See *Re Marlay, Duke of Rutland v Bury* [1915] 2 Ch 264 at 275, CA; and the cases cited in note 3 infra. A distinction must be made where there is a right to have a sale of land set aside and, the testatrix having had an equitable interest in it, the sale is set aside after her death. In such circumstances money payable as a term of setting aside the sale may go under the will to the devisee, at any rate where the devise is specific: see *Re Sherman, Re Walters, Trevenen v Pearce* [1954] Ch 653, [1954] 1 All ER 893 (sale by trustee for sale who provided the purchase money, the purchaser declaring himself a trustee for her).

2 *Re Sweeting, Sweeting v Sweeting* [1988] 1 All ER 1016.

3 *Lawes v Bennett* (1785) 1 Cox Eq Cas 167 at 171; *Weeding v Weeding* (1861) 1 John & H 424; *Re Blake, Gawthorne v Blake* [1917] 1 Ch 18 (although the exercise of the option was not followed up by completion). The rule applies whether the vendor dies testate or intestate, and even if the option is exercisable only after his death: *Re Isaacs, Isaacs v Reginall* [1894] 3 Ch 506; and see *Re Crofton* (1839) 1 I Eq R 204; *Re Cousins, Alexander v Cross* (1885) 30 ChD 203, CA. The rule has been extended so as to take the proceeds of sale of shares over which an option to purchase was given after the making of the will out of the hands of specific legatees and throw them into residue: *Re Carrington, Ralphs v Swithenbank* [1932] 1 Ch 1, CA; *Re Rose, Midland Bank Executor and Trustee Co v Rose* [1949] Ch 78, [1948] 2 All ER 971.

4 *Townley v Bedwell* (1808) 14 Ves 591; *Collingwood v Row* (1857) 3 Jur NS 785.

5 *Re Blake, Gawthorne v Blake* [1917] 1 Ch 18.

6 *Re Graves Minors, Graves v Graves* (1864) 15 I Ch R 357.

7 *Drant v Vause* (1842) 1 Y & C Ch Cas 580; *Emuss v Smith* (1848) 2 De G & Sm 722; *Re Calow, Calow v Calow* [1928] Ch 710. Where the will was confirmed by a codicil made on the same day as the agreement, the devise was held to carry the proceeds of sale (*Re Pyle, Pyle v Pyle* [1895] 1 Ch 724); and, where a testator specifically devises land which is subject to an uncompleted contract of sale, and refers to the proceeds of sale, the devisee will take such proceeds (*Re Calow, Calow v Calow* supra). The court was not prepared to extend the doctrine so as to hold a tenant exercising an option entitled to receive insurance money in respect of the premises due under a policy taken out by the landlord (*Edwards v West* (1878) 7 ChD 858); but the tenant is entitled to the proceeds of a policy taken out by himself, and, if owing to the landlord having also taken out a policy the loss is apportioned between the two policies, the landlord must account for what he receives to the tenant (*Reynard v Arnold* (1875) 10 Ch App 386).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(1) CONVERSION/(ii) Principles of Doctrine where Conversion may still Apply/715. Conversion under a power or by the court.

### 715. Conversion under a power or by the court.

Even where there is no imperative trust for conversion, there may be a disposition of the property under a power conferred by a settlor or testator, or otherwise existing. In such cases, if the disposition involves a change in the nature of the property, a conversion is effected upon the power being exercised<sup>1</sup>, and the conversion is final, and the property belongs to the beneficial owner at the time of conversion in its altered form. Hence, even though some of the purposes of the conversion fail, so that there is a surplus, this devolves upon the representatives of the owner in the altered form; and, if it was the proceeds of sale of land, there was formerly no equity in the heir to take the property as though it were land. This was equally the case whether the conversion was by a trustee under a power, or was in pursuance of a court order<sup>2</sup>, including formerly a sale in a partition action<sup>3</sup>. Consequently, where the court sells the estate of an adult<sup>4</sup>, or of a minor<sup>5</sup>, the property is converted out and out, the conversion taking effect from the date of the order<sup>6</sup>, and there is no reconversion of any proceeds of sale not required for the purpose of the order.

It is the same where a mortgagee sells under his power of sale during the lifetime of the mortgagor. Upon the mortgagor's death without having received the surplus, there was no equity in the heir to have the surplus reconverted, notwithstanding that the mortgage contained a trust for payment of the surplus to the mortgagor, his heirs and assigns<sup>7</sup>; but, if the land was sold after the mortgagor's death, the surplus belonged to the heir or devisee<sup>8</sup> notwithstanding that the trust was for payment to the mortgagor, his executors and administrators<sup>9</sup>.

1 *Re Dyson, Challinor v Sykes* [1910] 1 Ch 750. The power must, of course, be still in existence: *Re Jump, Galloway v Hope* [1903] 1 Ch 129.

2 *Steed v Preece* (1874) LR 18 Eq 192 at 197 per Jessel MR ('if a conversion is rightfully made, whether by the court or a trustee, all the consequences of a conversion must follow; and there is no equity in favour of the heir or anyone else to take the property in any other form than that in which it is found'); *Hyett v Meakin* (1884) 25 ChD 735. See also *Fauntleroy v Beebe* [1911] 2 Ch 257, CA. This dictum is opposed to *Jermy v Preston* (1842) 13 Sim 356 and *Cooke v Dealey* (1855) 22 Beav 196, but was approved in *Burgess v Booth* [1908] 2 Ch 648, CA. An order for sale on an incumbrancer's petition, however, operates as a conversion of only so much of the land as is required to pay off the incumbrance: *Sheane v Fetherstonhaugh* [1914] 1 IR 268.

3 *Re Dodson, Yates v Morton* [1908] 2 Ch 638. Owing to the statutory trusts imposed where land would be held in undivided shares (see PARA 467 ante), partition actions are now obsolete. As to conversion in such actions of the shares of persons under disability see *Foster v Foster* (1875) 1 ChD 588; *Mildmay v Quicke* (1877) 6 ChD 553; *Mordaunt v Benwell* (1881) 19 ChD 302; *Re Morgan, Smith v May* [1900] 2 Ch 474. Provision for partition by the trustees in certain circumstances of land held on trust for sale was made by the Law of Property Act 1925 s 28(3) (repealed): see REAL PROPERTY vol 39(2) (Reissue) PARA 215 et seq.

4 *Arnold v Dixon* (1874) LR 19 Eq 113.

5 *Burgess v Booth* [1908] 2 Ch 648, CA, disapproving *Scott v Scott* (1882) 9 LR 367; and see *Dyer v Dyer* (1865) 34 Beav 504. Formerly this was so in the case of a mentally disordered person (*Ex p Bromfield* (1792) 1 Ves 453; *Oxenden v Lord Compton* (1793) 2 Ves 69; *Ex p Phillips* (1812) 19 Ves 118); but under the Mental Health Act 1983 s 101 (see MENTAL HEALTH vol 30(2) (Reissue) PARA 746) the mentally disordered person and those deriving title under him have the same interest in proceeds of sale as in the property from which they arise: see *Re Matson, James v Dickinson* [1897] 2 Ch 509; *Re Alston, Sinclair v Willes* [1917] 2 Ch 226 (both decided under the Lunacy Act 1890 s 123 (repealed)). Real estate purchased on behalf of a mentally disordered person retains that character (*Re Searle, Ryder v Bond* [1912] 2 Ch 365; *Re Silva, Silva v Silva* [1929] 2 Ch 198),



and so do the proceeds of it if subsequently sold (*Re Silva, Silva v Silva* supra). The proceeds of timber on settled land, when the timber has been felled and sold under a court order, are personal estate: *Hartley v Pendarves* [1901] 2 Ch 498; but see *Field v Brown, Smith v Brown* (1859) 27 Beav 90.

6 *Burgess v Booth* [1908] 2 Ch 648, CA; *Arnold v Dixon* (1874) LR 19 Eq 113; and see *Pole v Pole* [1924] 1 Ch 156, CA (where the effect was to vest personal estate in the first tenant in tail by purchase, and the court declined to interfere). If the owner died intestate after the date of the order, there was no equity for reconversion as between his heir and next of kin: *Re Stinson's Estate* [1910] 1 IR 13, CA.

7 *Re Grange, Chadwick v Grange* [1907] 2 Ch 20, CA; and with yet stronger reason if the direction is for payment to the executors (*Re Underwood* (1857) 3 K & J 745).

8 *Bourne v Bourne* (1842) 2 Hare 35; and see *Re Cooper's Trusts, ex p Sparks* (1853) 4 De GM & G 757.

9 *Wright v Rose* (1825) 2 Sim & St 323.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(1) CONVERSION/(ii) Principles of Doctrine where Conversion may still Apply/716. Conversion by virtue of statute.

## **716. Conversion by virtue of statute.**

Where a statute imposes a trust for sale on land<sup>1</sup>, the doctrine of conversion applies in the same way as it may still apply<sup>2</sup> where there is an imperative direction in a will or settlement<sup>3</sup>, unless the statute provides to the contrary<sup>4</sup>. The consequence might thus be to adeem a testator's gift<sup>5</sup> unless the gift was subsequently confirmed by codicil bequeathing the proceeds of conversion<sup>6</sup>, or the language of the will was wide enough to carry any interest in the property whether it was in law real or personal property<sup>7</sup>.

1 Since 1 January 1997, a trust for sale of land is now generally a 'trust of land': see the Trusts of Land and Appointment of Trustees Act 1996 s 1; and REAL PROPERTY vol 39(2) (Reissue) PARA 66.

2 See PARA 702 ante.

3 See PARA 703 ante.

4 Conversion under the Fines and Recoveries Act 1833 was for certain purposes only (*Re Dickson's Settled Estates* [1921] 2 Ch 108, CA); likewise under the Settled Land Act 1882 s 22(5) (repealed: see now the Settled Land Act 1925 s 75(5)) (*Earl of Middleton v Cottlesloe* [1949] AC 418, [1949] 1 All ER 841, HL (conversion for purposes of disposition, transmission and devolution, but not for fiscal purposes)).

5 *Re Kempthorne, Charles v Kempthorne* [1930] 1 Ch 268, CA; *Re Newman, Slater v Newman* [1930] 2 Ch 409 (land held in undivided shares devised as freehold property; gift adeemed by virtue of transitional provisions of the Law of Property Act 1925). As to the doctrine of ademption of gifts by will see WILLS vol 50 (2005 Reissue) PARA 445 et seq.

6 Republication of a will does not make good a legacy that has been adeemed; and consequently a confirmation of an adeemed bequest sufficient to show that it is to operate on the proceeds of conversion is needed: see *Re Galway's Will Trusts, Lowther v Viscount Galway* [1950] Ch 1 at 9, [1949] 2 All ER 419 at 421, where Harman J distinguishes between the consequences of a disappropriation by statute and the change in form rather than substance effected by the transitional provisions of the real property legislation of 1925, by which owners were not deprived of beneficial interests. As regards the latter, no express confirmation of the gift by codicil was required: see *Re Wheeler, Jameson v Cotter* [1929] 2 KB 81n; *Re Harvey, Public Trustee v Hosken* [1947] Ch 285, [1947] 1 All ER 349; *Re Warren, Warren v Warren* [1932] 1 Ch 42; *Re Newman, Slater v Newman* [1930] 2 Ch 409.

7 *Re Mellish* (1927) reported in *Re Wheeler, Jameson v Cotter* [1929] 2 KB 81n at 82n ('all my share and interest'); *Re Newman, Slater v Newman* [1930] 2 Ch 409 (distinguishing *Re Mellish* supra).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(1) CONVERSION/(ii) Principles of Doctrine where Conversion may still Apply/717. Conversion in the case of partnership property.

### **717. Conversion in the case of partnership property.**

Real property belonging to partners had always been regarded in equity as personalty<sup>1</sup>, and this was made the statutory rule by the Partnership Act 1890<sup>2</sup>, subject to the expression of a contrary intention, not only as between the partners, including the personal representatives of a deceased partner, but also as between the persons entitled to the real and personal property of a deceased partner. The relevant provision of the Partnership Act 1890 was repealed by the Trusts of Land and Appointment of Trustees Act 1996<sup>3</sup>, except in so far as it applied in any circumstances involving the personal representatives of a partner who died before 1 January 1997<sup>4</sup>, but it is not clear whether the effect is that there is no conversion, or that the equitable rule is restored<sup>5</sup>.

1 *A-G v Hubbuck* (1884) 13 QBD 275, CA.

2 Partnership Act 1890 s 22 (repealed).

3 See the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4.

4 *Ibid* s 25(5).

5 The answer would seem to depend on whether that rule was based on contract (*Darby v Darby* (1856) 3 Drew 495), or on an implied trust for sale (*A-G v Hubbuck* (1884) 13 QBD 275, CA). Only in the latter case would the Trusts of Land and Appointment of Trustees Act 1996 s 3 apply to prevent the operation of the doctrine of conversion: see PARA 702 ante.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(1) CONVERSION/(iii) Election to Reconvert Property to which Doctrine of Conversion may still Apply/718. Election to reconvert.

### **(iii) Election to Reconvert Property to which Doctrine of Conversion may still Apply**

#### **718. Election to reconvert.**

When property which is subject to a trust for conversion<sup>1</sup> is vested, as regards the beneficial interest, in an absolute owner, he is entitled to take the property in its actual state, free from the trust for conversion, but he must indicate his election<sup>2</sup> to take the property in this manner. The election effects a reconversion<sup>3</sup>, but it is enough if the party shows an intention to take the property in its actual state; and it is immaterial whether he knows or does not know that, but for some election by him, the trust property, if money, would be turned into land, or, if land, would become money<sup>4</sup>.

1 As to the cases in which the doctrine of conversion may still apply see PARA 702 ante.

2 Such an election is an incident of the doctrine of conversion. It must, however, be distinguished from the election between two properties or benefits: see PARA 724 et seq post.

3 *Cookson v Cookson* (1845) 12 Cl & Fin 121 at 146, HL, per Lord Cottenham; and see *Pearson v Lane* (1809) 17 Ves 101 at 104 per Grant MR; *Ashby v Palmer* (1816) 1 Mer 296. When a mortgagee in possession dies while the statute is running in his favour, the mortgage debt and land devolve as personalty; but, as soon as the statute has run, the land vests as realty in the persons beneficially entitled to the mortgage debt, and no case for election arises: *Re Loveridge*, *Pearce v Marsh* [1904] 1 Ch 518.

4 *Harcourt v Seymour* (1851) 2 Sim NS 12 at 46.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(1) CONVERSION/(iii) Election to Reconvert Property to which Doctrine of Conversion may still Apply/719. Election by several owners or remainderman.

### 719. Election by several owners or remainderman.

Where the beneficial title to land subject to a trust for conversion<sup>1</sup> is vested in several persons, there can be no reconversion unless all concur<sup>2</sup>. Each is entitled to share in the enhanced price which the sale of the entirety of the estate might produce<sup>3</sup>. The same reason does not, however, apply where several persons are entitled to money to be laid out in land, and anyone may elect to take his share of the money unconverted<sup>4</sup>.

A remainderman may elect to take property unconverted; and his election will be operative if the property is still in fact unconverted when his interest falls into possession; this is so, whether he is entitled to a vested<sup>5</sup> or to a contingent<sup>6</sup> remainder. There can be no final reconversion, however, except by direction of the person absolutely entitled<sup>7</sup>.

1 As to the cases in which the doctrine of conversion may still apply see PARA 702 ante.

2 *Holloway v Radcliffe* (1857) 23 Beav 163; *Biggs v Peacock* (1882) 22 ChD 284, CA; *Re Tweedie and Miles* (1884) 27 ChD 315; *Re Douglas and Powell's Contract* [1902] 2 Ch 296 at 312. Consequently a trust for sale continues until there has been an election to reconvert by all the absolute owners: see *Re HE Jenkins and Randall & Co's Contract* [1903] 2 Ch 362. As to the duration of a power of sale see *Trower v Knightley* (1821) 6 Madd 134; *Peters v Lewes and East Grinstead Rly Co* (1881) 18 ChD 429, CA; *Re Cotton's Trustees and London School Board* (1882) 19 ChD 624; *Re Lord Sudeley and Baines & Co* [1894] 1 Ch 334; *Re Jump, Galloway v Hope* [1903] 1 Ch 129; *Talbot v Scarisbrick* [1908] 1 Ch 812; and POWERS. A power to postpone the sale is not determined by the vesting of a share in possession, so as to entitle the owner of the share to call either for an immediate sale or for a conveyance of an undivided share in the land: *Re Horsnaill, Womersley v Horsnaill* [1909] 1 Ch 631. Where land either before 1 January 1926 or after 31 December 1925 became subject to an express or implied trust for sale, such trust was, so far as regarded the safety and protection of any purchaser thereunder, deemed to be subsisting until the land had been conveyed to or under the direction of the persons interested in the proceeds of sale: see the Law of Property Act 1925 s 23 (repealed by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4) which applied to sales whenever made but operated without prejudice to an order of any court restraining a sale.

3 Prior to 1 January 1997, since the land could not be held in undivided shares, a reconversion could take the form of a partition between the persons entitled only (see the Law of Property Act 1925 s 28(3) (repealed by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4) but they might also take the land into their own control by having it vested in any of them, not exceeding four, as joint tenants on trust for sale (see the Law of Property Act 1925 s 3(1)(b) proviso (repealed by the Trusts of Land and Appointment of Trustees Act 1996 Sch 4)). As to partition by the trustees see now the Trusts of Land and Appointment of Trustees Act 1996 s 7 (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 223.

4 'Ie since, if invested in land, he might the next moment turn it into money, 'and equity, like nature, will do nothing in vain': *Seeley v Jago* (1717) 1 P Wms 389; *Walker v Denne* (1793) 2 Ves 170 at 182; and see *Walrond v Rosslyn*, *Walrond v Fulford* (1879) 11 ChD 640.

5 See *Crabtree v Bramble* (1747) 3 Atk 680.

6 *Meek v Devenish* (1877) 6 ChD 566. The contingency must, however, have happened before his death: *Re Sturt, De Bunsen v Harding* [1922] 1 Ch 416.

7 *Sisson v Giles* (1863) 3 De GJ & Sm 614.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(1) CONVERSION/(iii) Election to Reconvert Property to which Doctrine of Conversion may still Apply/720. No election by persons under disability.

## **720. No election by persons under disability.**

The person electing must be of full age and capacity, and hence a minor<sup>1</sup> cannot elect either to take money which is subject to conversion<sup>2</sup> into land<sup>3</sup>, or land which is subject to conversion into money<sup>4</sup>, but the court, upon finding that it is for his benefit, will elect on his behalf<sup>5</sup>. Similarly, a mentally disordered person cannot elect<sup>6</sup>, but the court can elect on his behalf<sup>7</sup>.

1 See PARA 709 note 1 ante.

2 As to the cases in which the doctrine of conversion may still apply see PARA 702 ante.

3 *Seeley v Jago* (1717) 1 P Wms 389; *Earlom v Saunders* (1754) Amb 241; *Carr v Ellison* (1786) 2 Bro CC 56; *Re Harrop's Estate* (1857) 3 Drew 726.

4 *Van v Barnett* (1812) 19 Ves 102 at 494.

5 *Robinson v Robinson* (1854) 19 Beav 494.

6 *Ashby v Palmer* (1816) 1 Mer 296; *Re Wharton* (1854) 5 De GM & G 33, CA; *Re Jump, Galloway v Hope* [1903] 1 Ch 129.

7 See *Re Douglas and Powell's Contract* [1902] 2 Ch 296; cf *A-G v Marquis of Aylesbury* (1887) 12 App Cas 672, HL.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(1) CONVERSION/(iii) Election to Reconvert Property to which Doctrine of Conversion may still Apply/721. Implied election to retain land.

## 721. Implied election to retain land.

An election to take property in its unconverted state<sup>1</sup> may be express, and it is then effectual even if it was oral<sup>2</sup>; or it may be presumed from circumstances<sup>3</sup>, slight circumstances being sufficient to show an intention to elect<sup>4</sup>. In the case of land such an intention will be presumed where the person entitled is in possession and retains the land for a considerable time<sup>5</sup>, especially if he lays out money on the land<sup>6</sup>, or pays off a charge on it<sup>7</sup>, or takes possession of the title deeds<sup>8</sup>, or otherwise deals with it as owner, as by granting a lease<sup>9</sup> or entering into an agreement for partition<sup>10</sup>. It has been held that two years is too short a time to raise the presumption<sup>11</sup>. Where a trustee for sale is also the remainderman, and the object of the trust, for example the payment of debts, has been answered without recourse to the land, an intention to reconvert may be inferred from his keeping the land unsold for a long time<sup>12</sup>. A devise of the property describing it specifically as land at a particular place will effect a reconversion<sup>13</sup>.

1 As to the cases in which the doctrine of conversion may still apply see PARA 702 ante.

2 *Edwards v Countess of Warwick* (1723) 2 P Wms 171; *Chaloner v Butcher* (1736) cited in *Crabtree v Bramble* (1747) 3 Atk 680; *Pulteney v Earl of Darlington* (1783) 1 Bro CC 223 at 236; *Wheldale v Partridge* (1803) 8 Ves 227 at 236; cf *Bradish v Gee* (1754) Amb 229.

3 *Harcourt v Seymour* (1851) 2 Sim NS 12 at 45.

4 *Pulteney v Earl of Darlington* (1783) 1 Bro CC 223 (affd (1796) 7 Bro Parl Cas 530, HL); *Van v Barnett* (1812) 19 Ves 102 at 109; and see *Re Ffennell's Settlement*, *Re Ffennell's Estate*, *Wright v Holton* [1918] 1 Ch 91 (appointment which failed not treated as showing an election to reconvert).

5 *Ashby v Palmer* (1816) 1 Mer 296 at 301; *Dixon v Gayfere*, *Fluker v Gordon* (1853) 17 Beav 433; *Re Gordon*, *Roberts v Gordon* (1877) 6 ChD 531; *Re Davidson*, *Martin v Trimmer*, *Davidson v Trimmer* (1879) 11 ChD 341, CA.

6 *Griesbach v Fremantle* (1853) 17 Beav 314; *Mutlow v Bigg* (1875) 1 ChD 385, CA.

7 *Re Davidson*, *Martin v Trimmer*, *Davidson v Trimmer* (1879) 11 ChD 341, CA.

8 *Davies v Ashford* (1845) 15 Sim 42; *Potter v Dudeney* (1887) 56 LT 395.

9 *Mutlow v Bigg* (1875) 1 ChD 385, CA; *Re Gordon*, *Roberts v Gordon* (1877) 6 ChD 531. It is otherwise if the lease contains an option to purchase: *Re Lewis*, *Foxwell v Lewis* (1885) 30 ChD 654.

10 *Sharp v St Sauveur* (1871) 7 Ch App 343.

11 *Kirkman v Miles* (1807) 13 Ves 338; cf *Brown v Brown* (1864) 33 Beav 399.

12 *Smith v Gumbleton* (1910) 54 Sol Jo 181. However, a person entitled under the same will to the proceeds of land in possession and of land in remainder does not, by showing an intention to reconvert the former, necessarily show also an intention to reconvert the latter: *Meredith v Vick* (1857) 23 Beav 559.

13 *Sharp v St Sauveur* (1871) 7 Ch App 343; *Meek v Devenish* (1877) 6 ChD 566 at 573.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(1) CONVERSION/(iii) Election to Reconvert Property to which Doctrine of Conversion may still Apply/722. Implied election to retain personality.

## **722. Implied election to retain personality.**

Where personality is subject to be invested in land, the mere receipt of the income from the personality investments, even for a considerable time, does not raise a presumption of election to take the property unconverted<sup>1</sup>. If, however, the beneficiary absolutely entitled receives payment of the capital money, it is in his hands to do as he likes with, and it is discharged from any trust for conversion. In such circumstances it is said to be 'at home', and passes in its actual state if the recipient dies without disposing of it; the former trust for conversion being no longer operative, there was formerly no equity in favour of the heir as against the personal representative<sup>2</sup>. Without actual receipt of money subject to a trust for conversion the beneficiary may refer to or deal with it in such a way as to show that he regards it as personality; and he is then deemed to have elected to take it as such, as where he includes it in a statement of his personal property<sup>3</sup> or describes it as money which he is entitled to receive<sup>4</sup>.

1 *Gillies v Longlands* (1851) 4 De G & Sm 372; *Re Pedder's Settlement* (1854) 5 De GM & G 890. As to the cases in which the doctrine of conversion may still apply see PARA 702 ante.

2 *Pulteney v Earl of Darlington* (1783) 1 Bro CC 223; affd (1796) 7 Bro Parl Cas 530, HL; *Wheldale v Partridge* (1803) 8 Ves 227 at 235; and see *Bowes v Earl of Shrewsbury* (1758) 5 Bro Parl Cas 144. In *Rich v Whitfield* (1866) LR 2 Eq 583, personality, which was directed to be invested in land, vested absolutely, subject to a prior life interest, in a child who died on the day of her birth, and remained uninvested in land for over 50 years until the death of the tenant for life; it was held to have been reconverted.

Where a settlor had covenanted in marriage articles to pay money to be laid out in the purchase of land, to be settled on trusts under which, the wife having died without issue, the settlor would be absolutely entitled if living, the money never having been invested in land, the settlor's heir was not entitled to the money on the settlor's death: *Chichester v Bickerstaff* (1693) 2 Vern 295.

3 *Harcourt v Seymour* (1851) 2 Sim NS 12.

4 *Cookson v Reay* (1842) 5 Beav 22 at 33, 34; affd sub nom *Cookson v Cookson* (1845) 12 Cl & Fin 121, HL.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(1) CONVERSION/(iii) Election to Reconvert Property to which Doctrine of Conversion may still Apply/723. Election implied from form of limitations.

### **723. Election implied from form of limitations.**

An election as to the form in which property is to be taken may be shown by the nature of the limitations which the beneficiary imposes<sup>1</sup>. Thus a grant of a lease, with a reservation of rent to the grantor and his heirs, has been held to indicate an intention to take the property as land<sup>2</sup> notwithstanding that the reservation could hardly have been in any other form<sup>3</sup>.

1 Where, by marriage articles, money was to be invested in land to be settled on trusts for the settlor, his wife and children and, there being no children of the marriage, the settlor called in and invested some of the money on trust for himself and his executors or administrators, the money so invested in securities passed as personalty on his death: *Lingen v Sowray* (1715) 1 P Wms 172.

2 As to the cases in which the doctrine of conversion may still apply see PARA 702 ante.

3 *Crabtree v Bramble* (1747) 3 Atk 680 at 689.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(2) ELECTION/724. The doctrine of election as applied to wills.

## (2) ELECTION

### 724. The doctrine of election as applied to wills.

Where a testator by his will purports to give<sup>1</sup> property to A which in fact belongs to B<sup>2</sup> and at the same time out of his own property confers benefits on B, the literal construction and application of the will would allow B to keep his own property to the disappointment of A, and also to take the benefits given to him by the will. Equity, however, in such circumstances, introduces the principle that a person may not accept and reject the same instrument, and B is not allowed to take the full benefit given to him by the will unless he is prepared to carry into effect the whole of the testator's dispositions<sup>3</sup>. He is accordingly put to his election to take either under the instrument or against it<sup>4</sup>. If he elects to take under the will, he is bound, and may be ordered<sup>5</sup>, to convey his own property to A; but, if he elects to take against the will and to keep his own property, and so disappoints A, then he cannot take any benefits under the will without compensating A out of such benefits to the extent of the value of the property of which A is disappointed<sup>6</sup>. It follows that, if B's property is such that it cannot be assigned, as where it consists of heirlooms, he is not put to his election<sup>7</sup>; nor is he put to his election where the surrender of the only interest capable of compensating other beneficiaries would destroy that interest and therefore defeat the object of the surrender<sup>8</sup>.

It is, moreover, of the essence of election not only that the property should not in fact be the testator's property, and that a benefit should be given by the will to the true owner of the property, but also that there should be an intention on the testator's part to dispose of certain property; this last condition is not fulfilled if at the date of the testator's death the gift has been adeemed<sup>9</sup>.

1 A person claiming something under a will is put to his election only if that which is claimed is bounty: *Re Fletcher's Settlement Trusts, Medley v Fletcher*[1936] 2 All ER 236 at 239-240 per Clauson J.

2 If at the date of the disposition taking effect the property given is not the property of the person to be put to election, there is no case for election: see *Re Coole, Coole v Flight*[1920] 2 Ch 536 at 544; *Re Anderson, Pegler v Gillatt*[1905] 2 Ch 70.

3 *Blake v Bunbury* (1792) 1 Ves 514 at 523; *Wollaston v King*(1869) LR 8 Eq 165; *Re Edwards, Macadam v Wright*[1958] Ch 168, [1957] 2 All ER 495, CA; cf *Jay v Jay*[1924] 1 KB 826. This is so also in the law of Scotland: *Pitman v Crum Ewing*[1911] AC 217, HL. 'The doctrine has been said to relate to the material validity of the relevant will ... For myself I should prefer to say that it is a doctrine by which equity fastens on the conscience of the person who is put to his election and refuses to allow him to take the benefit of a disposition contained in the will, the validity of which is not in question, except on certain conditions': *Re Mengel's Will Trusts, Westminster Bank Ltd v Menge*[1962] Ch 791 at 797, [1962] 2 All ER 490 at 492 per Buckley J. As to the origin of the doctrine of election and its derivation from the civil law see the note in 1 Swan at 394. The doctrine applies only where the benefit claimed under the will is bounty (see note 1 supra); in the case of mutual wills of husband and wife the doctrine does not apply so as to prevent the surviving spouse from taking a benefit under the deceased spouse's will and also making a new will, in the absence of a definite agreement to that effect: *Gray v Perpetual Trustee Co Ltd*[1928] AC 391, PC. As to the application of the doctrine of election where immovables pass by the *lex situs* contrary to the terms of a will see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 457.

4 *Birmingham v Kirwan* (1805) 2 Sch & Lef 444 at 449 per Lord Redesdale LC; *Codrington v Lindsay*(1873) 8 Ch App 578 at 587 per Lord Selborn LC (on appeal sub nom *Codrington v Codrington*(1875) LR 7 HL 854 at 861); *Cooper v Cooper*(1874) LR 7 HL 53 at 63 per Lord Cairns LC and at 70 per Lord Hatherley; *Brown v Gregson*[1920] AC 860 at 868, HL, per Viscount Haldane; and see *Noys v Mordaunt* (1706) 2 Vern 581 and *Streatfield v Streatfield* (1735) Cas temp Talb 176, both in 1 White & Tud LC (9th Edn) 366, 368; *Bor v Bor* (1756) 3 Bro Parl Cas 167, HL; *Whistler v Webster* (1794) 2 Ves 367 at 370; *Ker v Wauchope* (1819) 1 Bli 1 at

21, HL; and see *Re Vardon's Trusts*(1884) 28 ChD 124; revsd (1885) 31 ChD 275, CA (where the cases are collected); *Re Brooksbank, Beauclerk v James*(1886) 34 ChD 160 at 163. For a discussion of the maxim that 'one may not approbate and reprobate' see *Lissenden v CAV Bosch Ltd*[1940] AC 412 at 417-418, [1940] 1 All ER 425 at 428-429, HL, per Lord Maugham. The equitable doctrine has no connection with the common law principle which puts a person to his election whether eg he will affirm a contract induced by fraud or avoid it. These cases mainly relate to alternative remedies: *Lissenden v CAV Bosch Ltd* supra at 418 and at 429, HL. The doctrine did not apply where, under the Workmen's Compensation Act 1925 s 29(1) (repealed), an option was conferred on a workman either to claim compensation under that Act or take proceedings independently thereof: *Young v Bristol Aeroplane Co Ltd*[1946] AC 163, [1946] 1 All ER 98, HL.

5 *Blake v Bunbury* (1792) 1 Ves 514 at 527; *Gretton v Haward* (1819) 1 Swan 409 at 420; *Douglas v Douglas, Douglas v Webster*(1871) LR 12 Eq 617.

6 *Blake v Bunbury* (1792) 1 Ves 514 and, as reported, 4 Bro CC 21; *Lord Rancliffe v Lady Parkyns* (1818) 6 Dow 149 at 179, HL; *Gretton v Haward* (1819) 1 Swan 409; *Pickersgill v Rodger*(1876) 5 ChD 163; *Re Macartney, MacFarlane v Macartney*[1918] 1 Ch 300. If the gift to A fails through A's being unable to take, the effect will be to throw the subject of the gift into the residue, so that the residuary legatee profits by the election and takes either B's property or compensation: *Re Brooksbank, Beauclerk v James*(1886) 34 ChD 160. Where, by reason of an election to take under a will, property is set free to pass under it, the property becomes subject to such incidents as it would have been subject to had it been the property of the testator: *Re Williams, Cunliffe v Williams*[1915] 1 Ch 450. The text to notes 1-6 supra was quoted by Jenkins LJ in *Re Edwards, Macadam v Wright*[1958] Ch 168 at 172-173, [1957] 2 All ER 495 at 498, CA, as stating the general principles relating to the doctrine of election.

7 *Re Lord Chesham, Cavendish v Dacre*(1886) 31 ChD 466. Similarly, he is not put to election where the property consists of foreign property which cannot be made subject to the trusts of the will: *Brown v Gregson*[1920] AC 860, HL; explained in *Re Dicey, Julian v Dicey*[1957] Ch 145, [1956] 3 All ER 696, CA.

8 *Re Gordon's Will Trusts, National Westminster Bank Ltd v Gordon*[1978] Ch 145, [1978] 2 All ER 969, CA.

9 *Re Edwards, Macadam v Wright*[1958] Ch 168, [1957] 2 All ER 495, CA (where the testatrix gave her dwelling house upon trust for sale and named seven beneficiaries, including B, but afterwards entered into a binding contract with B to leave her the dwelling house; B was not put to her election). 'I find it impossible to accept the proposition that the question whether a case of election has been raised is to be resolved solely and exclusively by reading the will of the testator or testatrix simply with reference to the facts as they existed at the date of the death, or, rather, I should say simply by reference to the facts indicated merely by a reading of the will as at the date of death': *Re Edwards, Macadam v Wright* supra at 177 and at 501 per Jenkins LJ.

## UPDATE

### 724 The doctrine of election as applied to wills

NOTE 4--See also *Frear v Frear* [2008] EWCA Civ 1320, [2009] 1 FLR 391, [2009] 2 FCR 727.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(2) ELECTION/725. Requirement of claim under will.

## 725. Requirement of claim under will.

The doctrine of election requires that there shall be a claim under the will and a claim outside the will and adverse to it. It is not perhaps applied as between two clauses in the same will<sup>1</sup>. It applies even though part of the benefits in the testator's own property conferred by the will may fail<sup>2</sup>. Where two wills of the same testator, disposing of different properties, form one complete scheme of testamentary disposition, a beneficiary electing against one will may claim under the other only on terms of paying compensation<sup>3</sup>.

1 In *Wollaston v King* (1869) LR 8 Eq 165 at 174, James V-C held that the doctrine did not apply in such a case. A similar view was expressed obiter by Viscount Maugham in *Lissenden v CAV Bosch Ltd* [1940] AC 412 at 419, [1940] 1 All ER 425 at 431, HL, although Neville J had held to the contrary in *Re Macartney, Macfarlane v Macartney* [1918] 1 Ch 300. The failure of a gift in a codicil owing to the legatee being an attesting witness, whereby the property passes to the legatee and others under the residuary gift in the will, does not raise a case of election (*Burton v Newbery* (1875) 1 ChD 234 at 242; cf *Sheddon v Goodrich* (1803) 8 Ves 481 at 497; *Bizzey v Flight* (1876) 3 ChD 269 at 274); but, where under the same will a legatee takes a beneficial legacy and an onerous legacy, and the two are intended to form one aggregate gift, he must accept or reject both (*Talbot v Earl of Radnor* (1834) 3 My & K 252; *Re Hotchkys, Freke v Calmady* (1886) 32 ChD 408, CA; *Frewen v Law Life Assurance Society* [1896] 2 Ch 511; *Re Baron Kensington, Earl of Longford v Baron Kensington* [1902] 1 Ch 203 at 207). It is otherwise if the gifts can be construed as distinct: *Warren v Rudall, ex p Godfrey* (1860) 1 John & H 1 at 13; *Syer v Gladstone* (1885) 30 ChD 614.

2 *Newman v Newman* (1783) 1 Bro CC 186.

3 *Douglas-Menzies v Umphelby* [1908] AC 224, PC.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(2) ELECTION/726. Election not dependent on testator's knowledge.

## **726. Election not dependent on testator's knowledge.**

The doctrine of election does not depend upon the intention of the testator<sup>1</sup>. If he knows that the property of which he purports to dispose is another's, and gives that other benefits under the will, he may be supposed to intend to put that other to his election<sup>2</sup>. It is not necessary that the testator should have had in his mind the equitable principle of election<sup>3</sup>. The principle applies equally where he is in error as to his power of disposition, and thinks that the property of which he purports to dispose is his own<sup>4</sup>. The court does not speculate as to whether the testator would have made a different disposition had he known of his error, but takes the will as it is, and requires the beneficiaries to give effect to it<sup>5</sup>.

1 'The case in which the testator frames his will with the conscious intention of bringing of the doctrine into play must be very rare. In the great majority of cases to which the doctrine is applicable it applies because the testator has made a mistake': *Re Mengel's Will Trusts, Westminster Bank Ltd v Mengel* [1962] Ch 791 at 796-797, [1962] 2 All ER 490 at 492 per Buckley J.

2 See *Wilkinson v Dent* (1871) 6 Ch App 339 at 341. It was said in *Forrester v Cotton* (1760) 1 Eden 531 at 535 that the testator must know that he had no right to dispose of the land, and that, knowing it, he takes upon himself to dispose of it. This does not, however, represent the accepted rule.

3 *Cooper v Cooper* (1874) LR 7 HL 53 at 67. The doctrine is not excluded by the fact that, as to other property, the testator has expressly required legatees to take their legacies in satisfaction of sums due to them (*Wilkinson v Dent* (1871) 6 Ch App 339); although, if it appears that he meant to confine election to a particular property, it will not extend to other property (*East v Cook* (1750) 2 Ves Sen 30; and see the explanation of this case in *Wilkinson v Dent* supra). See also *Brown v Gregson* [1920] AC 860, HL.

4 *Walpole v Lord Conway* (1740) Barn Ch 153 at 159; *Kirkham v Smith* (1749) 1 Ves Sen 258 at 260-261; *Swan v Holmes* (1854) 19 Beav 471 at 477; *Wollaston v King* (1869) LR 8 Eq 165 at 173; *Re Harris, Leacroft v Harris* [1909] 2 Ch 206; and see *Welby v Welby* (1813) 2 Ves & B 187 at 199 per Grant MR.

5 *Whistler v Webster* (1794) 2 Ves 367 at 370; *Thellusson v Woodford* (1806) 13 Ves 209 at 221; affd sub nom *Rendlesham v Woodford* (1813) 1 Dow 249, HL.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(2) ELECTION/727. Election under deeds.

## 727. Election under deeds.

The doctrine of election is most frequently applied to dispositions by will, but it applies equally to deeds and other instruments inter vivos<sup>1</sup>. Thus, where a settlement purports to settle certain property, but is not effectual to do so, a person who claims the property adversely to the settlement cannot at the same time take advantage of other provisions of the settlement in his favour<sup>2</sup>. Two ante-nuptial settlements of even date, one of realty and the other of personalty, have been held to be one settlement for the purpose of putting to his election a person whose property was affected by one, and who claimed a benefit under the other<sup>3</sup>. It is doubtful whether the doctrine of election applies to a grant from the Crown<sup>4</sup>.

1 See *Codrington v Lindsay* (1873) 8 Ch App 578 at 587 (where the cases on instruments of different kinds are collected); on appeal sub nom *Codrington v Codrington* (1875) LR 7 HL 854; and see *Llevellyn v Mackworth* (1740) Barn Ch 445; *Bigland v Huddleston* (1789) 3 Bro CC 285n; *Cumming v Forrester* (1820) 2 Jac & W 334 at 345; *Mosley v Ward* (1861) 29 Beav 407; *Griffith-Boscawen v Scott* (1884) 26 ChD 358.

2 *Anderson v Abbott* (1857) 23 Beav 457; *Willoughby v Middleton* (1862) 2 John & H 344; *Brown v Brown* (1866) LR 2 Eq 481. Where, however, a person who himself takes no interest under the settlement claims property comprised in, but not bound by, the settlement under a party to the settlement who takes a benefit under it, there is apparently no case of election: *Campbell v Ingilby* (1856) 21 Beav 567; affd on different grounds (1857) 1 De G & J 393; and see *Brown v Brown* supra; but cf the reference to *Campbell v Ingilby* supra in *Codrington v Lindsay* (1873) 8 Ch App 578 at 593.

3 *Bacon v Cosby* (1851) 4 De G & Sm 261.

4 *Cumming v Forrester* (1820) 2 Jac & W 334 at 345. As to royal grants see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 849 et seq.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(2) ELECTION/728. Election under exercise of power.

## 728. Election under exercise of power.

The doctrine of election applies to an erroneous exercise of a special power of appointment by which property is appointed to a stranger, a benefit being at the same time conferred by the appointor out of his own property on an object of the power. The object of the power cannot claim this benefit and also exclude the stranger and take in default of appointment<sup>1</sup>. There is no distinction between an invalid gift of property which a testator believed to be his own and an invalid gift of property which the testator knew not to be his own, but over which he erroneously believed he had a power of appointment<sup>2</sup>; but, where there has been a proper appointment to an object of the power, invalid modifications of the appointment are altogether void and cannot be used to raise a case of election<sup>3</sup>. The doctrine is not available for curing illegality; hence an appointment to a stranger which is in its nature void for illegality, as where it infringes the rule against perpetuities, does not raise a case of election<sup>4</sup>.

1 *Whistler v Webster* (1794) 2 Ves 367. Thus, where, under a power to appoint to children of one marriage, an appointment was made in favour of children of a second marriage, a case of election arose in favour of the latter children: *White v White* (1882) 22 ChD 555. The doctrine applies where a settlor with a limited power of revocation revokes in excess of the power and, while purporting to dispose of the interests which were not revocable, gives benefits to the persons entitled to them under the settlement: *Coutts v Acworth* (1870) LR 9 Eq 519. See also POWERS vol 36(2) (Reissue) PARA 372 et seq.

2 *Cooper v Cooper* (1870) 6 Ch App 15 at 20; on appeal (1874) LR 7 HL 53; *Re Brooksbank, Beauclerk v James* (1886) 34 ChD 160.

3 *Carver v Bowles* (1831) 2 Russ & M 301 at 308; *Woolridge v Woolridge* (1859) John 63; *Re Neave, Neave v Neave* [1938] Ch 793, [1938] 3 All ER 220. Consequently precatory words added to the appointment will not put the appointee to election (*Blacket v Lamb* (1851) 14 Beav 482; *Langslow v Langslow* (1856) 21 Beav 552; *Churchill v Churchill* (1867) LR 5 Eq 44; cf *Tomkyns v Blane* (1860) 28 Beav 422), unless the benefit conferred by the will is subject to forfeiture on non-compliance (*King v King* (1864) 15 I Ch R 479).

4 *Re Nash, Cook v Frederick* [1910] 1 Ch 1 at 10, CA; approving *Wollaston v King* (1869) LR 8 Eq 165; *Re Warren's Trusts* (1884) 26 ChD 208; *Re Handcock's Trust* (1889) 23 LR Ir 34, CA; *Re Oliver's Settlement, Evered v Leigh* [1905] 1 Ch 191; *Re Beales' Settlement, Barrett v Beales* [1905] 1 Ch 256; *Re Wright, Whitworth v Wright* [1906] 2 Ch 288; and overruling *Re Bradshaw, Bradshaw v Bradshaw* [1902] 1 Ch 436. See, however, the judgment of Younger J in *Re Ogilvie, Ogilvie v Ogilvie* [1918] 1 Ch 492 at 501. See also *Re McCormick, Hazlewood v Foot* [1915] 1 IR 315. As to an invalid appointment under a power raising a case of election see *Re Stevens* (1912) 134 LT Jo 83; and POWERS vol 36(2) (Reissue) PARA 372 et seq.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(2) ELECTION/729. Scope and instances of doctrine of election.

## 729. Scope and instances of doctrine of election.

The doctrine of election applies as between all kinds of property and interests in property, and as between all classes of persons claiming property. For the purposes of election, no distinction can be drawn between personal and real estate, between specific and residuary devisees or legatees, or between legatees and next of kin of an intestate<sup>1</sup>. Where a testator disposed in favour of another of land belonging to his heir-at-law and devised land of his own to the heir-at-law, the heir was put to his election<sup>2</sup>. The obligation to elect is not limited to cases in which a person, if he chooses not to accept a will, is able by his renunciation to make the other relevant provisions take effect precisely according to their terms<sup>3</sup>.

Where a devise by an English will of land in Scotland or elsewhere is ineffectual through failure to comply with the local law, and the person inheriting by that law is a beneficiary under the will, he is put to his election<sup>4</sup>, but the property must be specifically described; a devise in general words will operate only on the land capable of passing under it<sup>5</sup>. This does not apply to an ineffective devise of real estate in England, on the principle that, where there is no instrument effectively passing the real estate, there is in effect no will and no case for election<sup>6</sup>.

A beneficiary may have to elect between benefits conferred by will and benefits conferred on him by a foreign law<sup>7</sup>.

1 *Cooper v Cooper* (1870) 6 Ch App 15 at 21; on appeal (1874) LR 7 HL 53; and see *Kirkham v Smith* (1749) 1 Ves Sen 258 at 260; *Webb v Earl of Shaftesbury*, *Earl of Shaftesbury v Arrowsmith* (1802) 7 Ves 480 at 488; cf *McDonald v McDonald* (1875) LR 2 Sc & Div 482. The doctrine applies where a testator purports to release a debt due to a third party upon whom he confers a benefit: *Synge v Synge* (1874) 9 Ch App 128. It was the rule that creditors in whose favour a devise in trust for payment of their debts had been made could not be put to their election between their remedies under the will and outside the will (*Kidney v Coussmaker* (1806) 12 Ves 136 at 154); but, since creditors now have their remedy against all assets, the doctrine is in this respect obsolete. The doctrine applied to copyholds: *Highway v Banner* (1785) 1 Bro CC 584 at 587-588; *Frank v Standish* (1772) 1 Bro CC 588n.

2 Formerly the heir-at-law took nothing under such a devise, because he took the devised land by his better title as heir-at-law; but, although strictly he derived no benefit under the will, the mere intention of the testator was held to put him to his election: *Welby v Welby* (1813) 2 Ves & B 187; *Thellusson v Woodford* (1806) 13 Ves 209 at 224; affd sub nom *Rendlesham v Woodford* (1813) 1 Dow 249, HL; *Schroder v Schroder* (1854) Kay 578; affd 3 Eq Rep 97. Under the Inheritance Act 1833 s 3 (as amended) the heir in such a case took as devisee. Since the former law of descent is abolished as regards the real estate of persons dying after 31 December 1925 (see the Administration of Estates Act 1925 s 45(1)), the question of election in these circumstances is now unlikely to arise.

Before the Wills Act 1837 a minor's will was valid as to personal estate but not as to real estate, so the heir-at-law might become entitled by descent owing to the failure of the devise, and to personal estate under the will; but he was not put to his election: *Hearle v Greenbank* (1749) 3 Atk 695 at 715.

3 *Re Dicey, Julian v Dicey* [1956] Ch 357, [1956] 2 All ER 74; affd [1957] Ch 145, [1956] 3 All ER 696, CA.

4 *Brodie v Barry* (1813) 2 Ves & B 127; *Dundas v Dundas* (1830) 2 Dow & Cl 349; *Dewar v Maitland* (1866) LR 2 Eq 834 (where the cases where the heir is and is not put to his election are contrasted by Stuart V-C); *Orrell v Orrell* (1871) 6 Ch App 302; *Haynes v Foster* [1901] 1 Ch 361; *Re Ogilvie, Ogilvie v Ogilvie* [1918] 1 Ch 492; cf *Brown v Gregson* [1920] AC 860, HL; and see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 457.

5 *Maxwell v Maxwell* (1852) 2 De GM & G 705.

6 *Hearle v Greenbank* (1749) 3 Atk 695; *Re De Virte, Vaiani v De Virte* [1915] 1 Ch 920; and see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 457. Cf para 724 note 2 ante.



7     *Re Mengel's Will Trusts, Westminster Bank Ltd v Mengel* [1962] Ch 791, [1962] 2 All ER 490 (election between benefits conferred by will and benefits conferred by Danish law of community of assets).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(2) ELECTION/730. Intention to dispose of particular property must be clear.

### **730. Intention to dispose of particular property must be clear.**

To raise a case of election under a will on the ground that the testator has attempted to dispose of property over which he had no disposing power, it must be clearly shown that he intended to dispose of the particular property<sup>1</sup>. This intention must appear on the face of the will, either by express words or by necessary conclusion from the circumstances disclosed by the will<sup>2</sup>.

The presumption is that a testator intends to dispose only of his own property<sup>3</sup>, and general words will not usually be construed so as to include other property<sup>4</sup>, nor will oral evidence be admitted to show that the testator believed that other property to be his own so as to allow it to be comprised in general words<sup>5</sup>. Similarly, where a testator has a limited interest in property and purports to dispose of the property itself, the presumption is that he intends to dispose only of his limited interest<sup>6</sup>. If it is sought to carry the disposition further, it must be shown that he intended to dispose of more than that interest, but for this purpose positive declaration is not necessary. Regard may be had to the context of the will, and to the inaptitude of the testamentary limitations if applied to the testator's actual interest<sup>7</sup>. A devise of an estate which is subject to incumbrances does not, however, by itself import an intention to devise it free from incumbrances, so as to put incumbrancers who take under the will to their election<sup>8</sup>.

It may appear from a recital that a testator has disposed of his own property under an erroneous belief as to the interests in other property of certain beneficiaries under his will, giving less to some on the footing that they would be compensated by their interests in the other property. Such a recital is not, however, equivalent to a disposition of the other property so as to raise a case of election against the persons who unduly benefit under the will<sup>9</sup>.

1 *Dashwood v Peyton* (1811) 18 Ves 27 at 41; *Lord Rancliffe v Lady Parkyns* (1818) 6 Dow 149 at 179, HL; *Wintour v Clifton* (1856) 8 De GM & G 641 at 650; *Re Edwards, Macadam v Wright* [1958] Ch 168 at 175, [1957] 2 All ER 495 at 499, CA, per Jenkins LJ; and see *Re Dicey, Julian v Dicey* [1956] Ch 357, [1956] 2 All ER 74; affd [1957] Ch 145, [1956] 3 All ER 696, CA.

2 *Blake v Bunbury* (1792) 4 Bro CC 21 at 24; *Doe d Oxenden v Chichester* (1816) 4 Dow 65; *Clementson v Gandy* (1836) 1 Keen 309; *Re Harris, Leacroft v Harris* [1909] 2 Ch 206. A testator's widow will be put to her election by a devise of all the testator's interest in property which belongs solely to her: *Whitley v Whitley* (1862) 31 Beav 173. See also *Re Sullivan, Sullivan v Sullivan* [1917] 1 IR 38.

3 *Lord Rancliffe v Lady Parkyns* (1818) 6 Dow 149, HL; *Usticke v Peters* (1858) 4 K & J 437; *Cosby v Lord Ashtown* (1859) 10 I Ch R 219; *Thornton v Thornton* (1861) 11 I Ch R 474 at 480; *Pickersgill v Rodger* (1876) 5 ChD 163 at 170; and see *Re Harris, Leacroft v Harris* [1909] 2 Ch 206.

4 *Forrester v Cotton* (1760) 1 Eden 531 at 535; *Blommart v Player* (1826) 2 Sim & St 597; *Miller v Thurgood* (1864) 33 Beav 496 at 500; *Re Bidwell's Settlement Trusts* (1862) 11 WR 161; *Re Booker, Booker v Booker* (1886) 54 LT 239; *Re Harris, Leacroft v Harris* [1909] 2 Ch 206; *Re Mengel's Will Trusts, Westminster Bank Ltd v Mengel* [1962] Ch 791, [1962] 2 All ER 490. In a settlement, however, general words which are clearly intended to bring in property not in law included in the settlement may be allowed their full effect: *Willoughby v Middleton* (1862) 2 John & H 344. In the case of a will an intention by the testator to include property belonging to another in a gift of residue may even be gathered, for it is necessary to construe a will as a whole: see *Re Allen's Estate, Prescott v Allen and Beaumont* [1945] 2 All ER 264 (gift of the 'residue of my property' construed as the residue of the testator's ostensible property). The bequest by a husband of 'all his jewels for life and afterwards as heirlooms' was held in *Jervoise v Jervoise* (1853) 17 Beav 566 not to include jewels given by the husband to his wife and worn with the family jewels, so as to put her to election; but the old rules as to

paraphernalia may have become obsolete (*Masson, Templier & Co v De Fries* [1909] 2 KB 831, CA; *Rondeau, Legrand & Co v Marks* [1918] 1 KB 75, CA).

5 *Stratton v Best* (1791) 1 Ves 285. In several cases it was considered that evidence outside the will might be admitted to show that the testator considered the property his own, and so intended to include it in general words, eg evidence of an assignment, albeit ineffectual, to the testator (*Rutter v Maclean* (1799) 4 Ves 531 at 537; and see *Pole v Lord Somers* (1801) 6 Ves 309), or of accounts showing that he had dealt with it as his own (*Pulteney v Lord Darlington* (1776) cited in 3 Ves 529; *Druce v Dension* (1801) 6 Ves 385). Such evidence is, however, inadmissible: *Doe d Oxenden v Chichester* (1816) 4 Dow 65 at 89-90, HL; *Dummer v Pitcher* (1833) 2 My & K 262; *Clementson v Gandy* (1836) 1 Keen 309; *Dixon v Samson* (1837) 2 Y & C Ex 566; *Galvin v Devereux* [1903] 1 IR 185; and see *Read v Crop* (1785) 1 Bro CC 492, as cited in 1 Swan at 402n; but see the dictum of Jessel MR in *Pickersgill v Rodger* (1876) 5 ChD 163 at 171, in favour of admitting oral evidence. See also the Administration of Justice Act 1982 s 21; and PARA 750 post.

6 *Maddison v Chapman* (1861) 1 John & H 470; *Howells v Jenkins* (1862) 2 John & H 706 (on appeal (1863) 1 De GJ & Sm 617, CA); *Henry v Henry* (1872) 6 IR Eq 286; *Drummer v Pitcher* (1833) 2 My & K 262; *Evans v Evans* (1863) 2 New Rep 409. If the testator's only interest is a life interest, however, and the intention appearing on the will is to dispose of his interest, if any, there is no case of election: *Galvin v Devereux* [1903] 1 IR 185.

7 *Wintour v Clifton* (1856) 8 De GM & G 641; *Usticke v Peters* (1858) 4 K & J 437; *Welby v Welby* (1813) 2 Ves & B 187; and see *Shuttleworth v Greaves* (1838) 4 My & Cr 35; *Padbury v Clark* (1850) 2 Mac & G 298; *Honywood v Forster (No 2)* (1861) 30 Beav 14.

Where a co-owner of property devised the property specifically without restriction to his share and conferred a benefit on another co-owner, there would usually be a case of election against that co-owner: *Fitzsimons v Fitzsimons* (1860) 28 Beav 417; *Swan v Holmes* (1854) 19 Beav 471; *Miller v Thurgood* (1864) 33 Beav 496; *Wilkinson v Dent* (1871) 6 Ch App 339; *Henry v Henry* (1872) 6 IR Eq 286 at 295; and see *Padbury v Clark* (1850) 2 Mac & G 298; cf *Chave v Chave* (1830) 2 John & H 713n; *Re Bidwell's Settlement Trusts* (1862) 11 WR 161. Since land cannot now be held in undivided shares (see PARA 467 ante), this could apply now only to a bequest of more than the testator's share of the proceeds of sale.

A bequest to a third person of stock standing in the joint names of a testator and his wife, where benefits are conferred on the wife, will put her to her election: *Grosvenor v Durston* (1858) 25 Beav 97; *Re Carpenter, Carpenter v Disney* (1884) 51 LT 773. Where a testator agreed to settle property in favour of his niece and left her a legacy on the footing that she would relinquish her claim to the settlement, she was put to her election: see *Central Trust and Safe Deposit Co v Snider* [1916] 1 AC 266, PC.

8 *Stephens v Stephens* (1857) 1 De G & J 62; *Henry v Henry* (1872) 6 IR Eq 286 at 297. However, a devise inconsistent with the continuance of the incumbrances will put the incumbrancers, if they are beneficiaries under the will, to their election: *Blake v Bunbury* (1792) 1 Ves 514 at 523; cf *Sadlier v Butler* (1867) 1 IR Eq 415 (incumbrancer put to his election). See also *Re Williams, Cunliffe v Williams* [1915] 1 Ch 450.

9 *Box v Barrett* (1866) LR 3 Eq 244. Thus a recital, without more, cannot amount to a gift or show an intention to give (see *Dashwood v Peyton* (1811) 18 Ves 27 at 41); nor is there a case for election where a testator, erroneously reciting that a hotchpot clause will apply, refrains from appointing the unappointed residue of a fund (*Langslow v Langslow* (1856) 21 Beav 552).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(2) ELECTION/731. Election depends on compensation.

### 731. Election depends on compensation.

In applying the doctrine of election, equity proceeds upon the principle of compensation, not of forfeiture. Thus the beneficiary who elects against the instrument and keeps his own property is not required to abandon all the benefits which are conferred upon him by the instrument. These benefits are treated in equity as a fund out of which compensation must be made to the disappointed beneficiary, and, after such compensation, the electing beneficiary is entitled to any surplus which may remain<sup>1</sup>. The duty to make compensation imposes a personal liability on the electing beneficiary which will furnish ground for a claim<sup>2</sup>, or, after his death, for a claim against his estate<sup>3</sup>. Where the person to elect dies, and the properties go in different directions, the obligation to compensate falls on the persons who succeed to the benefits out of which, according to the above rule, compensation ought to have been made<sup>4</sup>. The amount of compensation payable must be ascertained, in the case of a will, as at the date of the testator's death and not at the time when the election is made<sup>5</sup>.

1 *Welby v Welby* (1813) 2 Ves & B 187 at 191; *Lord Rancliffe v Lady Parkyns* (1818) 6 Dow 149 at 179, HL; *Gretton v Haward* (1819) 1 Swan 409. About the date of these decisions the question of forfeiture or compensation was regarded as doubtful: see *Green v Green* (1816) 2 Mer 86 at 93 per Lord Eldon LC; *Tibbits v Tibbits* (1821) Jac 317 at 319. The later cases are, however, uniform in affirming the principle of compensation: see eg *Rich v Cockell*, *Rich v Hull* (1804) 9 Ves 369; *Ker v Wauchope* (1819) 1 Bli 1 at 25, HL; *Schroder v Schroder* (1854) Kay 578; *Rogers v Jones* (1876) 3 ChD 688; *Pickersgill v Rodger* (1876) 5 ChD 163 at 173; *Smith v Lucas* (1881) 18 ChD 531 at 545; *Re Vardon's Trusts* (1884) 28 ChD 124 at 131; *Re Lord Chesham, Cavendish v Dacre* (1886) 31 ChD 466 at 473. The fund available for compensation will be apportioned among the disappointed legatees, rateably according to their interests: *A-G v Fletcher* (1835) 5 LJ Ch 75; *Howells v Jenkins* (1863) 1 De GJ & Sm 617, CA; and see *Re Booth, Booth v Robinson* [1906] 2 Ch 321 (more than one person called upon to elect).

2 *Rogers v Jones* (1877) 7 ChD 345 at 350.

3 *Greenwood v Penny* (1850) 12 Beav 403.

4 *Pickersgill v Rodger* (1876) 5 ChD 163 at 174.

5 *Re Hancock, Hancock v Pawson* [1905] 1 Ch 16.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(2) ELECTION/732. No election without fund for compensation.

### **732. No election without fund for compensation.**

From the principle that election proceeds on the footing of compensation it follows that no case for election will be raised against a person whose property a testator has purported to dispose of, unless he takes under the will a benefit out of property of which the testator can actually dispose. It is only such a benefit which gives the necessary fund for compensation. The doctrine of election cannot be applied except where, if an election is made contrary to the will, the interest that would pass by the will can be laid hold of to compensate the beneficiary who is disappointed by the election. In all cases, therefore, there must be some free disposable property given by the will to the person whom it is sought to put to his election<sup>1</sup>; there will be no case for election unless the interest given will be freely available to be applied in compensating the disappointed parties<sup>2</sup>.

Hence, where a testator purports to exercise a limited power of appointment by appointing to a stranger, and appoints also to an object of the power, the latter may claim to participate, as in default of appointment, in the share appointed to the stranger, without compensating the stranger out of the properly appointed share<sup>3</sup>. No part of the fund is at the testator's disposal. To raise a case of election the testator must make both a direct appointment to a stranger to the power<sup>4</sup> and a gift of the testator's free property to an object of the power<sup>5</sup>.

1 *Bristow v Warde* (1794) 2 Ves 336. The statement of the principle in *Bristow v Warde* supra at 350 per Lord Loughborough LC is verbally inaccurate, and is altered in the text to accord with the apparent meaning: *Re Fowler's Trust* (1859) 27 Beav 362; *Re Aplin's Trust* (1865) 13 WR 1062; cf *Wallinger v Wallinger* (1869) LR 9 Eq 301. The doctrine of election is most frequently applied to dispositions by will, but that doctrine and the principle of compensation are not confined to wills: see PARA 727 ante. It makes no difference that the testator's own property is expressly given in payment of a statute-barred debt: *Re Fletcher's Settlement Trusts, Medley v Fletcher* [1936] 2 All ER 236.

2 *Re Gordon's Will Trusts, National Westminster Bank Ltd v Gordon* [1978] Ch 145, [1978] 2 All ER 969, CA (person it was alleged should elect given a protected life interest under the Trustee Act 1925 s 33 (now as amended), which interest he was incapable of alienating).

3 *Re Fowler's Trust* (1859) 27 Beav 362; *Re Aplin's Trust* (1865) 13 WR 1062.

4 An appointment to an object of the power subject to a request to him to give the property to a stranger will not suffice, the request being merely void: *Blacket v Lamb* (1851) 14 Beav 482.

5 *Whistler v Webster* (1794) 2 Ves 367.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(2) ELECTION/733. Person taking under a derivative title.

### **733. Person taking under a derivative title.**

Where a testator purports to dispose of property which is not his own, no case of election arises against a person who takes the property by a derivative title after the testator's death and who is also a beneficiary under the will<sup>1</sup>. At the date when the will comes into operation he must be in a position to claim an interest in the property in his own right<sup>2</sup>. A beneficiary is not put to his election because he has a derivative title under another person who was the true owner at the time of the death<sup>3</sup>. Where that other person was also a beneficiary under the will and elected against it, paying compensation, there is the additional consideration that the payment has freed the property from the obligation of further election<sup>4</sup>.

1 Thus, where a testator disposed of a married woman's property and conferred by his will benefits on her husband, the husband, on becoming entitled to his wife's property as administrator, was not put to his election: *Grissell v Swinhoe* (1869) LR 7 Eq 291; and see *Howells v Jenkins* (1862) 2 John & H 706; on appeal (1863) 1 De GJ & Sm 617, CA; *Brown v Brown* (1866) LR 2 Eq 481 at 485.

2 Where the owner of property which the testator has purported to dispose of is dead, it is sufficient if the beneficiary under the testator's will is entitled to an interest in the property as the deceased owner's next of kin, notwithstanding that his interest is subject to payment of the deceased owner's debts: *Cooper v Cooper* (1870) 6 Ch App 15 at 21; on appeal (1874) LR 7 HL 53.

3 *Cooper v Cooper* (1870) 6 Ch App 15; cf *Armstrong v Lynn* (1875) 9 IR Eq 186.

4 *Lady Cavan v Pulteney* (1795) 2 Ves 544.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(2) ELECTION/734. Person electing entitled to information.

### **734. Person electing entitled to information.**

No person may be required to elect without a clear knowledge of both the funds or properties between which he has to elect<sup>1</sup>. Hence he is entitled to be allowed time to consider as to his election<sup>2</sup>; and, if necessary, the election will be postponed until accounts of the property concerned have been taken<sup>3</sup>. If a claim<sup>4</sup> is pending, the necessary accounts and inquiries may be taken and made in the proceedings<sup>5</sup>; otherwise, the person who wishes to decide as to election may begin a claim to ascertain the value of the properties<sup>6</sup>. An election made before the party has had an opportunity of ascertaining his rights and their value<sup>7</sup>, or while he is under a mistake as to matters on which those rights depend<sup>8</sup>, will not be binding, although, if election has once been deliberately made, persons claiming under the electing party are bound by it without distinct evidence being given that he was aware of his rights<sup>9</sup>.

1 *Whistler v Webster* (1794) 2 Ves 367 at 371; and see *Pusey v Desbouvrie* (1734) 3 P Wms 315; *Chalmers v Storil* (1813) 2 Ves & B 222; *Pigott v Bagley* (1825) M'Cle & Yo 569, Ex Ch; *Wilson v Thornbury* (1875) 10 Ch App 239.

2 See *Codrington v Lindsay* (1873) 8 Ch App 578 at 593; on appeal sub nom *Codrington v Codrington* (1875) LR 7 HL 854; *Re Hancock*, *Hancock v Pawson* [1905] 1 Ch 16 at 19.

3 *Hender v Rose* (1718) as reported in 3 P Wms 124n; *Newman v Newman* (1783) 1 Bro CC 186; *Boynton v Boynton* (1785) 1 Bro CC 445 at 446.

4 Formerly known as 'an action': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

5 *Douglas v Douglas*, *Douglas v Webster* (1871) LR 12 Eq 617.

6 *Butricke v Broadhurst* (1790) 1 Ves 171; and see 1 Swan at 381n; but in *Douglas v Douglas*, *Douglas v Webster* (1871) LR 12 Eq 617 at 637 Wickens V-C intimated that the rule might require restriction.

7 *Pusey v Desbouvrie* (1734) 3 P Wms 315.

8 *Kidney v Coussmaker* (1806) 12 Ves 136 at 153.

9 *Dewar v Maitland* (1866) LR 2 Eq 834 at 838.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(2) ELECTION/735. Election where several persons interested.

### **735. Election where several persons interested.**

Where several persons are interested in the property disposed of by the testator, and are also beneficiaries under his will, an election by one does not bind the others; this is so whether they are entitled simultaneously as co-owners<sup>1</sup>, or in succession as tenant for life and remaindermen<sup>2</sup>. All the persons interested have a right to exercise their judgment as to the way in which they will elect, and next of kin are not bound by the administrator's election<sup>3</sup>. Compensation may be payable among themselves by persons electing against the will to others so electing, and such compensation must then be included by the latter in the benefits taken by them under the will<sup>4</sup>.

1 *Fytche v Fytche* (1868) LR 7 Eq 494.

2 *Ward v Baugh* (1799) 4 Ves 623; *Hutchison v Skelton* (1856) 2 Macq 492 at 495, HL; cf *Long v Long* (1800) 5 Ves 445 (point not decided). Note that, subject to certain exceptions, it has not been possible to create a strict settlement under the Settled Land Act 1925 since the coming into force of the Trusts of Land and Appointment of Trustees Act 1996 on 1 January 1997: see REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS.

3 *Fytche v Fytche* (1868) LR 7 Eq 494; *Re Dicey, Julian v Dicey* [1957] Ch 145, [1956] 3 All ER 696, CA.

4 *Re Booth, Booth v Robinson* [1906] 2 Ch 321.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(2) ELECTION/736. Time for election.

### **736. Time for election.**

If a person required by the court to elect within a specified time does not elect within that time, he is treated as having elected against the instrument<sup>1</sup>. Otherwise, however, no definite time limit can be assigned for election; and, if a party neither is required to elect nor does any acts from which election can be inferred, his right to elect will remain open until it becomes inequitable to assert it<sup>2</sup>. This will be the case if he has allowed the property devised away from himself to be enjoyed by the devisee for a long time, for example ten years<sup>3</sup>.

1 *Streatfield v Streatfield* (1735) Cas temp Talb 176; and see 1 Swan 447 (where the decree which shows this is given).

2 *Butricke v Broadhurst* (1790) 1 Ves 171.

3 *Tibbits v Tibbits* (1816) 19 Ves 656 at 662.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(2) ELECTION/737. Election may be express or implied.

### 737. Election may be express or implied.

Election is a question of fact, and must be ascertained as such<sup>1</sup>. It may be express, or may be implied from the acts of the person bound to elect. To constitute an implied election there must be clear proof that the person put to his election was aware of the nature and extent of his rights and that, having that knowledge, he intended to elect<sup>2</sup>. Where there has been ignorance of the right, an enjoyment of the benefits conferred by the will for a considerable time will not prevent the party from claiming to elect<sup>3</sup>; but, where, with knowledge of his obligation to elect, a person enjoys property given by the will or exercises acts of ownership over it, he will be held to have elected to confirm the will, and will be debarred from keeping his own property as well<sup>4</sup>. Similar acts in relation to his own property will show an election against the will<sup>5</sup>. It is necessary, however, to have regard to the history of both the properties between which election was to be made, and possession of, or acts of ownership over, both will raise no presumption of election<sup>6</sup>. An implied election is binding on the representatives of the person electing<sup>7</sup>; although, if, notwithstanding the acceptance of benefits, the election has been left doubtful, the representatives may, perhaps, elect on renouncing the benefits and paying compensation<sup>8</sup>.

1 *Roundel v Curren* (1786) 2 Bro CC 67 at 73. To constitute a binding election there must be some unequivocal act: see *Re Shepherd, Harris v Shepherd* [1943] Ch 8, [1942] 2 All ER 584.

2 *Worthington v Wiginton* (1855) 20 Beav 67 at 74 per Romilly MR; and see *Stratford v Powell* (1807) 1 Ball & B 1; *Dillon v Parker* (1818) 1 Swan 359 at 382 (on appeal (1833) 7 Bli NS 325, HL); *Morgan v Edwards* (1827) 1 Bli NS 401, HL (affirming the case sub nom *Edwards v Morgan*, *Morgan v Edwards* (1824) M'Cle 541); *Wintour v Clifton* (1856) 21 Beav 447 at 468 (on appeal 8 De GM & G 641); *Spread v Morgan* (1865) 11 HL Cas 588.

3 *Wake v Wake* (1791) 3 Bro CC 255 (three years' receipt of an annuity); *Reynard v Spence* (1841) 4 Beav 103 at 106 (five years' receipt); *Sopwith v Maughan* (1861) 30 Beav 235 (provision in lieu of dower enjoyed by widow for 16 years, but, as the certificate found, 'in ignorance of her right to dower'); *Fytche v Fytche* (1868) 19 LT 343; *Re Turner, Turner v Fitzroy* (1892) 66 LT 758.

4 *Butricke v Broadhurst* (1790) 3 Bro CC 88; *Worthington v Wiginton* (1855) 20 Beav 67; *Whitley v Whitley* (1862) 31 Beav 173. The receipt of a legacy shows an intention to take under the will (*Earl of Northumberland v Earl of Aylesford* (1760) Amb 540 (subsequent proceedings sub nom *Duke of Northumberland v Lord Egremont* (1768) Amb 657); *Ardesoife v Bennet* (1772) 2 Dick 463); and the court does not readily disturb arrangements to which the parties have assented (see *Tomkyns v Ladbroke* (1755) 2 Ves Sen 591 at 593; and the cases collected in 1 Swan at 381n).

5 Eg a sale of the property: *Rogers v Jones* (1876) 3 ChD 688.

6 *Dillon v Parker* (1818) 1 Swan 359 at 380; on appeal (1833) 7 Bli NS 325, HL; *Padbury v Clark* (1850) 2 Mac & G 298; *Morgan v Morgan* (1853) 4 I Ch R 606 at 614; *Spread v Morgan* (1865) 11 HL Cas 588 at 613. Where, however, an heir enjoyed land which was ineffectually devised to him for a limited interest to which he was, therefore, entitled by descent, and he also enjoyed land well devised, he was presumed to have elected to take under the will: *Dewar v Maitland* (1866) LR 2 Eq 834. See also *Giddings v Giddings* (1827) 3 Russ 241.

7 *Earl of Northumberland v Earl of Aylesford* (1760) Amb 540 (subsequent proceedings sub nom *Duke of Northumberland v Lord Egremont* (1768) Amb 657); *Ardesoife v Bennet* (1772) 2 Dick 463; *Dewar v Maitland* (1866) LR 2 Eq 834. Indeed, cases of implied election generally arise where the party has died; where he is alive, he may contradict the implication: *Sopwith v Maughan* (1861) 30 Beav 235 at 239.

8 See *Dillon v Parker* (1818) 1 Swan 359 at 385.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(2) ELECTION/738. Persons under disability.

### **738. Persons under disability.**

In the case of a person who is mentally disordered the court will elect on his behalf, or direct or authorise a receiver appointed for him to do so<sup>1</sup>.

In the case of a minor<sup>2</sup>, the court elects for him at the hearing of the matter in which the question arises<sup>3</sup> or, if there is some doubt as to what is for his benefit, directs an inquiry as to the course which is for his benefit and then elects in accordance with the result of the inquiry<sup>4</sup>.

1 Apart from the court's inherent jurisdiction to act with respect to the property and affairs of a mentally disordered person the court has statutory power to do so: see the Mental Health Act 1983 ss 95, 96; and MENTAL HEALTH vol 30(2) (Reissue) PARA 682 et seq. As to the court's power to appoint a receiver see s 99; and MENTAL HEALTH vol 30(2) (Reissue) PARAS 682-683, 1463 et seq.

2 See PARA 709 note 1 ante.

3 *Blunt v Lack* (1856) 3 Jur NS 195; *Lamb v Lamb* (1857) 5 WR 772; *Prole v Soady* (1859) 2 Giff 1; *Re Montagu, Faber v Montagu* [1896] 1 Ch 549.

4 *Bigland v Huddleston* (1789) 3 Bro CC 285n; *Brown v Brown* (1866) LR 2 Eq 481 at 486; *Bennett v Houldsworth* (1877) 6 ChD 671 at 680. Originally the election was deferred until the minor came of age: *Streatfield v Streatfield* (1735) Cas temp Talb 176 at 183; *Boughton v Boughton* (1750) 2 Ves Sen 12 at 16. See the note to *Gretton v Haward* (1819) 1 Swan 409 at 413 and the cases there cited; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 48.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(3) SATISFACTION AND ADEMPATION/739. Meaning of 'satisfaction' and 'ademption'.

### **(3) SATISFACTION AND ADEMPATION**

#### **739. Meaning of 'satisfaction' and 'ademption'.**

Satisfaction is the gift of a thing with the intention that it shall be taken either wholly or partly in extinguishment of some prior claim of the donee<sup>1</sup>. Satisfaction may occur when:

- 111 (1) a covenant to settle property is followed by a gift by will or settlement in favour of the person entitled beneficially under the covenant<sup>2</sup>;
- 112 (2) a testamentary disposition is followed during the testator's lifetime by a gift or settlement in favour of the devisee or legatee<sup>3</sup>; and
- 113 (3) a legacy is given to a creditor<sup>4</sup>.

Ademption is the term which correctly describes, among other matters<sup>5</sup>, the second category of instances in which the doctrine of satisfaction applies; and, where a testamentary gift is wholly or partly extinguished by a subsequent gift or disposition made by the testator in his lifetime, the testamentary gift is said to be adeemed in whole or in part<sup>6</sup>.

In all cases of satisfaction the question is one of the intention of the settlor or testator<sup>7</sup>. If he expressly declares that the later disposition is to be in satisfaction of the earlier obligation or disposition, the matter is governed by this expression of his intention, and effect is given to the later disposition accordingly<sup>8</sup>; but, where a will contained an expression of intention that subsequent provisions made by the testator should be in satisfaction to that extent of annuities bequeathed, a person given an annuity by the will who had been given an annuity by deed before the will took both<sup>9</sup>. In the absence of such expression, certain presumptions as to his intention are raised in equity, to rebut or support which intrinsic evidence, and in certain cases extrinsic evidence, may be used<sup>10</sup>. The onus of rebutting a presumption raised by equity rests upon those who allege that in the circumstances it does not apply<sup>11</sup>.

A case of satisfaction arises only where the person who makes the payment is himself the party bound to pay, or is the owner of the estate charged with the payment<sup>12</sup>, or is exercising a power of appointment<sup>13</sup>. The three cases already stated are shortly described as:

- 114 (a) satisfaction of portions by legacies or subsequent portions;
- 115 (b) ademption of legacies by portions; and
- 116 (c) satisfaction of debts by legacies.

In cases falling within heads (a) and (b) above, the presumption is much less easily rebutted than in cases falling within head (c) above<sup>14</sup>. It is strongest in cases falling within head (b) above<sup>15</sup>.

<sup>1</sup> See the definition in 2 White & Tud LC (9th Edn) 326, adopted by Lord Romilly in *Lord Chichester v Coventry* (1867) LR 2 HL 71 at 95. There will be no satisfaction if both a gift by will to a donee and a later gift inter vivos by the testator to the same donee are 'pure bounty', 'spontaneous bounty', or 'mere gifts': *Re Cameron, Phillips v Cameron* [1999] Ch 386, [1999] 2 All ER 924.

2 See *Hinchcliffe v Hinchcliffe* (1797) 3 Ves 516; *Weall v Rice* (1831) 2 Russ & M 251; *Lady Thynne v Earl of Glengall* (1848) 2 HL Cas 131; *Scott and ors (Scott's Trustees)* 1912 50 SLR 299.

3 *Ex p Pye, ex p Dubost* (1811) 18 Ves 140; 2 White & Tud LC (9th Edn) 314; *Pym v Lockyer* (1841) 5 My & Cr 29. The settlement may be by way of covenant to pay: *Cooper v Macdonald* (1873) LR 16 Eq 258. 'The essence of ademption surely is that there should have been a gift by will of property belonging to the testator or testatrix at the date of the will, followed by some dealing inter vivos with the property inconsistent with the testamentary gift': *Re Edwards, Macadam v Wright* [1958] Ch 168 at 178, [1957] 2 All ER 495 at 501, CA, per Jenkins LJ. If a gift in a will has been adeemed, a subsequent codicil has no effect (*Powys v Mansfield* (1837) 3 My & Cr 359 at 376 per Lord Cottenham; *Montague v Montague* (1852) 15 Beav 565; *Hopwood v Hopwood* (1859) 7 HL Cas 728; cf *Re Warren, Warren v Warren* [1932] 1 Ch 42), although it may be taken into account in deciding the intention with which the subsequent advancement was made (*Ravenscroft v Jones* (1864) 4 De GJ & Sm 224; *Re Scott, Langton v Scott* [1903] 1 Ch 1, CA).

4 *Talbot v Duke of Shrewsbury* (1714) Prec Ch 394; 2 White & Tud LC (9th Edn) 323.

5 As to conversion causing ademption see PARA 716 ante; and as to ademption generally see WILLS vol 50 (2005 Reissue) PARA 445 et seq.

6 See *Lord Chichester v Coventry* (1867) LR 2 HL 71 at 90; *Re Moore's Rents* [1917] 1 IR 244; the rule stated in *Trimmer v Bayne* (1802) 7 Ves 508 at 515; and note 3 supra.

7 *Weall v Rice* (1831) 2 Russ & M 251 at 265; *Hopwood v Hopwood* (1859) 7 HL Cas 728 at 737; *Lord Chichester v Coventry* (1867) LR 2 HL 71 at 82; *Re Cameron, Phillips v Cameron* [1999] Ch 386, [1999] 2 All ER 924. Hence regard must be paid to the circumstances at the date of the instrument alleged to constitute satisfaction, and not to the actual result: *Cartwright v Cartwright* [1903] 2 Ch 306; and see *Lenham v Wall* [1922] 1 IR 59.

8 *Davis v Chambers* (1857) 7 De GM & G 386; and see *Twisden v Twisden* (1804) 9 Ves 413; *Hardingham v Thomas* (1854) 2 Drew 353; *Scott and ors (Scott's Trustees)* 1912 50 SLR 299; *Re Eardley's Will, Simeon v Freemantle* [1920] 1 Ch 397. A direction that portions are to be deemed to be satisfied by subsequent advances made by a specified person during his lifetime is not operative as regards benefits passing under his will (*Cooper v Cooper* (1873) 8 Ch App 813) or on his intestacy (*Twisden v Twisden* supra). Where the direction is not expressly limited to subsequent advances made by a specified person during his lifetime, it is not operative as regards benefits subsequently conferred, such as testamentary gifts, which are mere bounty: *Re Livesey's Settlement Trusts, Livesey v Livesey* [1953] 2 All ER 723, [1953] 1 WLR 1114. As to certain inconsistencies in the earlier cases see *Cooper v Cooper* supra.

9 *Re Van den Bergh's Will Trusts, Van den Bergh v Simpson* [1948] 1 All ER 935 (where there also were differences in quality between the two annuities).

10 See PARA 750 post.

11 *Papillon v Papillon* (1841) 11 Sim 642; *Montague v Montague* (1852) 15 Beav 565; *Hopwood v Hopwood* (1859) 7 HL Cas 728.

12 *Samuel v Ward* (1856) 22 Beav 347 at 350.

13 *Re Ashton, Ingram v Papillon* [1897] 2 Ch 574; revsd on other grounds [1898] 1 Ch 142, CA; but see *Re Eardley's Will, Simeon v Freemantle* [1920] 1 Ch 397.

14 *Lady Thynne v Earl of Glengall* (1848) 2 HL Cas 131 at 153. A question as to presumption against double gifts arises also where legacies are left to the same person by different testamentary instruments, or different legacies by the same instrument: see *Ridges v Morrison* (1784) 1 Bro CC 389 at 393; *Coote v Boyd* (1789) 2 Bro CC 521; *Benyon v Benyon* (1810) 17 Ves 34; *Currie v Pye* (1811) 17 Ves 462; *Hurst v Beach* (1821) 5 Madd 351; *Yockney v Hansard* (1844) 3 Hare 620; *Lee v Pain* (1845) 4 Hare 201; *Roch v Callen* (1847) 6 Hare 531; *Whyte v Whyte* (1873) LR 17 Eq 50; and see WILLS vol 50 (2005 Reissue) PARAS 685-687.

15 See PARA 745 post.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(3) SATISFACTION AND ADEPTION/740. Presumption of satisfaction of portion by legacy or subsequent portion and legacy by portion.

#### **740. Presumption of satisfaction of portion by legacy or subsequent portion and legacy by portion.**

In the cases of a portion followed by a legacy, and of a legacy followed by a portion, where the gifts are substantially of the same nature<sup>1</sup> and in favour of the same person, there arises a presumption of satisfaction where:

- 117 (1) the settlor or testator is the parent<sup>2</sup> of the donee, or has placed himself in loco parentis to the donee<sup>3</sup>; or
- 118 (2) the first disposition is expressed to be made for a specific purpose, and the second disposition effects that purpose.

In a case falling within head (1) above, the presumption is founded on the court's leaning against double portions<sup>4</sup>; and, in a case falling within head (2) above, the presumption is founded upon the intention of the testator or settlor as appearing from the instruments and from the circumstances of the later disposition<sup>5</sup>. The presumption also arises as regards two dispositions, both expressed to be made for the purpose of satisfying the same moral obligation<sup>6</sup>. There is, however, no satisfaction where the two dispositions are expressed to have different objects<sup>7</sup>.

1 Where a will precedes a settlement, the rule against double portions will not apply so as to cut down pro tanto the operation of a special power of appointment conferred on the trustees of the will: *Re Vaux, Nicholson v Vaux* [1939] Ch 465, [1938] 4 All ER 703, CA.

2 See PARA 744 note 2 post.

3 If a child has to account on the footing of satisfaction, persons claiming under him are under the same liability (*Re Scott, Langton v Scott* [1903] 1 Ch 1, CA); but the liability of children taking the share of their deceased parent is not on the footing of the parent's indebtedness to the testator (*Re Binns, Public Trustee v Ingle* [1929] 1 Ch 677). See *Re Cameron, Phillips v Cameron* [1999] Ch 386, [1999] 2 All ER 924 (an inter vivos gift to a child's child can be a gift in favour of the child). The rule against double portions to children does not apply in Scotland: *Johnstone v Haviland* [1896] AC 95, HL.

4 See *Ex p Pye, ex p Dubost* (1811) 18 Ves 140 at 151 per Lord Eldon LC; *Weall v Rice* (1831) 2 Russ & M 251 at 267; *Pym v Lockyer* (1841) 5 My & Cr 29 at 34-35 per Lord Cottenham LC; *Lord Chichester v Coventry* (1867) LR 2 HL 71 at 86; *Montagu v Earl of Sandwich* (1886) 32 ChD 525 at 534, CA; *Re Lacon, Lacon v Lacon* [1891] 2 Ch 482 at 492, CA, per Lindley LJ and at 497 per Bowen LJ; *Re Vaux, Nicholson v Vaux* [1939] Ch 465 at 481-482, [1938] 4 All ER 703 at 708-709, CA, per Lord Greene MR; *Re Cameron, Phillips v Cameron* [1999] Ch 386, [1999] 2 All ER 924.

5 See *Monck v Lord Monck* (1810) 1 Ball & B 298 at 303 per Lord Manners LC; cf *Roome v Roome* (1744) 3 Atk 181 at 183; *Debeze v Mann* (1789) 2 Bro CC 519; *Powel v Cleaver* (1789) 2 Bro CC 499; *Pankhurst v Howell* (1870) 6 Ch App 136; *Re Smythies, Weyman v Smythies* [1903] 1 Ch 259; *Re Furness, Furness v Stalkartt* [1901] 2 Ch 346 at 349; *Re Corbett, Corbett v Lord Cobham* [1903] 2 Ch 326; *Re Jupp, Harris v Grierson* [1922] 2 Ch 359.

6 *Re Pollock, Pollock v Worrall* (1885) 28 ChD 552, CA. In *Re Jupp, Harris v Grierson* [1922] 2 Ch 359 no moral obligation was specified.

7 *Re Aynsley, Kyrle v Turner* [1915] 1 Ch 172, CA. In *Pankhurst v Howell* (1870) 6 Ch App 136, a legacy of a sum of money to the testator's wife to be paid within ten days of his death was not adeemed by a gift of the same amount made during his last illness in order that she might have money in hand on his death. In *Re*

*Fletcher, Gillings v Fletcher* (1888) 38 ChD 373, however, where the testator bequeathed his wife £625, which was the exact amount of his indebtedness to her, and then paid off the debt in his lifetime, that sum was held not to be payable as a legacy. It has been held that a legacy is not satisfied by a subsequent gift to the legatee expressed in a letter to be in substitution for the legacy if the letter is not communicated to the legatee in the testator's lifetime: *Re Shields, Corbould-Ellis v Dales* [1912] 1 Ch 591. However, in *Re Cameron, Phillips v Cameron* [1999] Ch 386 at 410, [1999] 2 All ER 924 at 944 (para 65), Lindsay J observed that this case did not involve a portion, and said that in his opinion in relation to the ademption of a gift by will by way of a later inter vivos gift there is no need for the donee to be a party to or to know of the inter vivos gift. There is no presumption of satisfaction of a donatio mortis causa by a bequest of the same amount contained in a will executed after the gift: *Hudson v Spencer* [1910] 2 Ch 285; and see GIFTS.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(3) SATISFACTION AND ADEMPATION/741. Both gifts must be in nature of portions.

#### **741. Both gifts must be in nature of portions.**

Where the donor is the parent<sup>1</sup> or, or in loco parentis to, the donee, the presumption of satisfaction arises only when the two gifts are in the nature of portions<sup>2</sup>. A portion is a sum of money given to a child, by way of advancement, on marriage<sup>3</sup>, or for the purpose of establishing him in business<sup>4</sup>, or as a permanent provision<sup>5</sup>, and in general it is only such a gift which will operate, as a satisfaction of a prior gift<sup>6</sup>. Where a large sum is given and nothing is known as to the circumstances, the sum given should be treated as an advance within the rule against double portions<sup>7</sup>. A legacy, including a gift of residue, from a parent to a child is presumed to be intended to be a portion<sup>8</sup>. Even a gift on discretionary trusts amongst a class of the testator's children and grandchildren cannot necessarily be regarded as not conferring a portion on a child if the trustees in fact in their discretion make a disposition in that child's favour<sup>9</sup>. Gifts of small sums<sup>10</sup>, or payments of an annuity during the testator's lifetime<sup>11</sup>, will not, however, raise the presumption. Moreover, in the case of ademption, the gift must be subsequent to the date of the will<sup>12</sup>.

1 See PARA 744 note 2 post.

2 *Re Lacon, Lacon v Lacon* [1891] 2 Ch 482 at 498, CA, per Bowen LJ; and see *Re Hayward, Kerrod v Hayward* [1956] 3 All ER 608, [1956] 1 WLR 1490 (affd [1957] Ch 528, [1957] 2 All ER 474, CA); *Hardy v Shaw* [1976] Ch 82, [1975] 2 All ER 1052. There is no presumption of satisfaction where two portions are derived from different estates (*Douglas v Willes* (1849) 7 Hare 318 at 328; *Samuel v Ward* (1856) 22 Beav 347 at 350); but a sum appointed under a special power may be a portion within the presumption of satisfaction (*Montague v Montague* (1852) 15 Beav 565; *Re Peel's Settlement, Biddulph v Peel* [1911] 2 Ch 165; and see *Re Ashton, Ingram v Papillon* [1897] 2 Ch 574 at 579). A gift need not be made voluntarily to be regarded as a portion: *Re George's Will Trusts, Barclays Bank Ltd v George* [1949] Ch 154, [1948] 2 All ER 1004.

3 *Taylor v Taylor* (1875) LR 20 Eq 155 at 157-158 per Jessel MR; *Re Tussaud's Estate, Tussaud v Turner* (1878) 9 ChD 363.

4 *Taylor v Taylor* (1875) LR 20 Eq 155 at 158 per Jessel MR; and see *Hoskins v Hoskins* (1706) Prec Ch 263; *Schofield v Heap* (1858) 27 Beav 93; *Andrew v Andrew* (1874) 30 LT 457; *Re Lacon, Lacon v Lacon* [1891] 2 Ch 482, CA; *Re Watney, Watney v Gold* (1911) 56 Sol Jo 109; *Re Vaux, Nicholson v Vaux* [1939] Ch 465 at 481-482, [1938] 4 All ER 703 at 709, CA. It must be a benefit provided by the settlor, not merely a liability which he has incurred to the child eg by breach of trust: *Crichton v Crichton* [1895] 2 Ch 853 at 859; on appeal [1896] 1 Ch 870, CA. A gift by a farmer to his son of live and dead stock with which to set up in business as a farmer has been regarded as a portion: *Re George's Will Trusts, Barclays Bank Ltd v George* [1949] Ch 154, [1948] 2 All ER 1004.

5 *Hardy v Shaw* [1976] Ch 82, [1975] 2 All ER 1052, applying *Taylor v Taylor* (1875) LR 20 Eq 155; *Re Hayward, Kerrod v Hayward* [1956] 3 All ER 608, [1956] 1 WLR 1490 (affd [1957] Ch 528, [1957] 2 All ER 474, CA); and see *Re Cameron, Phillips v Cameron* [1999] Ch 386, [1999] 2 All ER 924. There was no difference between cases of double portions and the former statutory provision dealing with advancement in the Administration of Estates Act 1925 s 47(1)(iii) (repealed) (see EXECUTORS AND ADMINISTRATORS vol 17(2) Reissue) PARA 605); *Hardy v Shaw* supra.

6 *Re Scott, Langton v Scott* [1903] 1 Ch 1, CA; and see *Re Hayward, Kerrod v Hayward* [1956] 3 All ER 608, [1956] 1 WLR 1490; affd [1957] Ch 528, [1957] 2 All ER 474, CA. Money provided by a father to pay his son's debts was formerly treated as an advance (*Boyd v Boyd* (1867) LR 4 Eq 305; *Re Blockley, Blockley v Blockley* (1885) 29 ChD 250); but the view of Jessel MR in *Taylor v Taylor* (1875) LR 20 Eq 155 has prevailed, and the provision of sums for such a purpose does not raise a presumption of satisfaction (*Re Scott, Langton v Scott* supra).



7 *Leighton v Leighton* (1874) LR 18 Eq 458 at 468; *Re Scott, Langton v Scott* [1903] 1 Ch 1 at 13, 16, CA; *Hardy v Shaw* [1976] Ch 82, [1975] 2 All ER 1052, CA. In *Re Livesey's Settlement Trusts, Livesey v Livesey* [1953] 2 All ER 723, [1953] 1 WLR 1114, Roxburgh J refused to accept the argument that the gift of a large sum, where the purpose of the gift was not known, should necessarily be treated as a gift for a person's 'advancement or preferment in the world' within the meaning to be attached to those words in a particular settlement he had to construe. This view was questioned by Upjohn J in *Re Hayward, Kerrod v Hayward* [1956] 3 All ER 608 at 610, [1956] 1 WLR 1490 at 1493. In the Court of Appeal Jenkins LJ merely said of *Re Livesey's Settlement Trusts, Livesey v Livesey* supra that it seemed to have turned upon the language of the particular document: see *Re Hayward, Kerrod v Hayward* [1957] Ch 528 at 541, [1957] 2 All ER 474 at 481, CA. Where a testator becomes mentally disordered after, by his will, directing advances out of surplus income to be brought into hotchpot, the court has a discretion as to enforcing this requirement: *Re Merrill, Greener v Merrill* [1924] 1 Ch 45.

8 *Pym v Lockyer* (1841) 5 My & Cr 29 at 35 per Lord Cottenham; *Ex p Pye, ex p Dubost* (1811) 18 Ves 140 at 151 per Lord Eldon; *Lady Thynne v Earl of Glengall* (1848) 2 HL Cas 131; *Montefiore v Guedalla* (1859) 1 De GF & J 93; *Stevenson v Masson* (1873) LR 17 Eq 78; *Re Cameron, Phillips v Cameron* [1999] Ch 386, [1999] 2 All ER 924.

9 *Re Vaux* [1939] Ch 465 at 482, [1938] 4 All ER 703 at 709, CA, per Greene MR; *Re Cameron, Phillips v Cameron* [1999] Ch 386 at 407, [1999] 2 All ER 924 at 941 (para 57) per Lindsay J.

10 *Schofield v Heap* (1858) 27 Beav 93; *Watson v Watson* (1864) 33 Beav 574; *Ravenscroft v Jones* (1864) 4 De GJ & Sm 224; *Re Peacock's Estate* (1872) LR 14 Eq 236 at 240; *Re Hayward, Kerrod v Hayward* [1956] 3 All ER 608, [1956] 1 WLR 1490; affd [1957] Ch 528, [1957] 2 All ER 474, CA. The court has never added up small sums in order to show that, if the child claims those sums as well as the larger provision made for him by the parent, he would be taking a double portion: see *Suisse v Lowther* (1843) 2 Hare 424 at 434 per Wigram V-C; affd 12 LJ Ch 315. As to evidence whether a cheque is given as a gift or a loan see *Re England, England v Garnett* (1912) 134 LT Jo 29.

11 See *Hatfeild v Minet* (1878) 8 ChD 136, CA; *Watson v Watson* (1864) 33 Beav 574; cf *Lord Kircudbright v Lady Kircudbright* (1802) 8 Ves 51.

12 Gifts made before the date of the will cannot operate as an ademption (*Re Peacock's Estate* (1872) LR 14 Eq 236; *Taylor v Cartwright* (1872) LR 14 Eq 167 at 176; *Leighton v Leighton* (1874) LR 18 Eq 458) unless so agreed by the donee (*Upton v Prince* (1735) Cas temp Talb 71).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(3) SATISFACTION AND ADEPTION/742. Satisfaction pro tanto.

## 742. Satisfaction pro tanto.

The doctrine of satisfaction does not require that the second provision should be equal in value to, or greater than, the first; in a case which is otherwise suitable for raising the presumption, a later, smaller provision will be a satisfaction to that extent of the earlier provision<sup>1</sup>; and, in the case of ademption, a later, smaller provision does not destroy altogether the provision in the will; it destroys it only pro tanto<sup>2</sup>. The value of the provision given by a subsequent settlement must be ascertained as at the date of the settlement, and the amount deducted from the legacy<sup>3</sup>. Where a will contains two provisions bestowing portions on a child, a subsequent advancement will adeem the portion which it most closely resembles<sup>4</sup>.

1 *Warren v Warren* (1783) 1 Bro CC 305; *Lady Thynne v Earl of Glengall* (1848) 2 HL Cas 131 at 154; *Re Moore's Rents* [1917] 1 IR 244.

2 There was at one time an impression that ademption by a smaller gift might destroy the provision in the will entirely (*Ex p Pye, ex p Dubost* (1811) 18 Ves 140 at 151); but the cases were reviewed by Lord Cottenham LC in *Pym v Lockyer* (1841) 5 My & Cr 29, and he held that in such a case the ademption took effect only pro tanto, and this has been accepted as the settled rule (*Kirk v Eddowes* (1844) 3 Hare 509; *Re Pollock, Pollock v Worrall* (1885) 28 ChD 552, CA; *Re Jupp, Harris v Grierson* [1922] 2 Ch 359).

3 *Watson v Watson* (1864) 33 Beav 574; *Re Innes, Barclay v Innes* (1908) 125 LT Jo 60. Similarly, the value of settled funds to be brought into account under a hotchpot clause in a will is the value at the date of the settlement, and not at the date of the will: *Re Crocker, Crocker v Crocker* [1916] 1 Ch 25.

4 *Montefiore v Guedalla* (1859) 1 De GF & J 93.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(3) SATISFACTION AND ADEMPATION/743. In case of satisfaction of an obligation, the donee may elect.

**743. In case of satisfaction of an obligation, the donee may elect.**

In a case of ademption the beneficiary has no choice whether he will take the earlier or the later provision. The earlier provision depends solely on the testator's bounty, and the ademption operates by way of revocation of the bounty, either wholly or in part. Where, however, by a settlement a settlor has undertaken an obligation, he has no right to terminate that obligation by substituting a different provision by his will or by a later settlement<sup>1</sup>. Hence, where such different provision would operate as satisfaction, so that the beneficiary cannot take both provisions, he is entitled to elect between the two<sup>2</sup>.

1 Without the consent of those entitled under the settlement, the settlor cannot substitute the benefits he may have chosen to confer by his will for those which he had already secured by deed: see *Lord Chichester v Coventry* (1867) LR 2 HL 71 at 87 per Lord Cranworth.

2 *Lord Chichester v Coventry* (1867) LR 2 HL 71 at 91 per Lord Romilly MR; and see *Hinchcliffe v Hinchcliffe* (1797) 3 Ves 516 at 528; *Lady Thynne v Earl of Glengall* (1848) 2 HL Cas 131 at 155; *McCarogher v Whieldon* (1867) LR 3 Eq 236, discussed in *Re Gordon's Will Trusts*, *National Westminster Bank Ltd v Gordon* [1978] Ch 145, [1978] 2 All ER 969, CA; cf *Pole v Lord Somers* (1801) 6 Ves 309.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(3) SATISFACTION AND ADEMPATION/744. Person in loco parentis.

#### 744. Person in loco parentis.

The presumption against double portions<sup>1</sup> arises when the provisions are made by the parent<sup>2</sup> of, or by a person in loco parentis to, the donee<sup>3</sup>. A person is in loco parentis to the donee when he has placed himself in the situation of the donee's lawful parent<sup>4</sup>, so far as such situation relates to the parent's duty to make provision for the donee<sup>5</sup>. Whether a person has placed himself in this relation is a question of fact as to which oral evidence is admissible<sup>6</sup>. The relation will be readily inferred where the donee resides with, and is maintained by, the donor<sup>7</sup>; or if the donee is an orphan and is maintained by the donor, although not residing with him<sup>8</sup>. A donor may be in loco parentis to a donee even where the donee has a parent living, and resides with and is maintained by him, especially if the donor contributes to the family income<sup>9</sup>. A grandfather<sup>10</sup>, grandmother<sup>11</sup>, uncle<sup>12</sup>, or other collateral relation<sup>13</sup> is in the position of a stranger for the purpose of the rule, and evidence must be given of an intention to put himself or herself in loco parentis. It used to be held that a father was in a similar position in respect of his illegitimate child<sup>14</sup>, but in such a case there is an obvious duty to make provision for the child, and doubtless the presumption would now arise without evidence<sup>15</sup>; and equally in the case of a mother<sup>16</sup>. The mere leaving of a legacy does not show an intention on the testator's part to place himself in loco parentis to the legatee<sup>17</sup>.

Gifts are not debarred from being portions by reason of their being given by attorneys duly appointed under the Enduring Powers of Attorney Act 1985<sup>18</sup>.

<sup>1</sup> See PARA 740 ante.

<sup>2</sup> Many of the older cases restrict the donor to the father: *Ex p Pye, ex p Dubost* (1811) 18 Ves 140; *Re Ashton, Ingram v Papillon* [1897] 2 Ch 574, CA; *Re Eardley's Will, Simeon v Freemantle* [1920] 1 Ch 397; *Re Ware, Re Rouse, Ware v Rouse* [1926] WN 163, 70 Sol Jo 691; and see *Bennet v Bennet* (1879) 10 ChD 474; *Re Eyre, Johnson v Williams* [1917] 1 Ch 351. However other cases are consistent with the view that the presumption arises whichever parent is the donor: *Pym v Lockyer* (1841) 5 My & Cr 29; *Watson v Watson* (1864) 33 Beav 574; *Pankhurst v Howell* (1870) 6 Ch App 136; *Re Pollock* (1885) 28 Ch D 552, CA; *Re Furness, Furness v Stalkartt* [1901] 2 Ch 346. After a review of the authorities Lindsay J held, in *Re Cameron, Phillips v Cameron* [1999] Ch 386, [1999] 2 All ER 924, that nowadays so far as concerns portions both parents should be taken to be in loco parentis unless the contrary is proved. It should be noted that, under the Children Act 1989 s 2 (as amended), s 3, both parents, if married to each other at the time of the child's birth, are now regarded as having equal rights and duties: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 133 et seq.

<sup>3</sup> *Suisse v Lowther* (1843) 2 Hare 424 at 435; affd 12 LJ Ch 315; cf *Powel v Cleaver* (1789) 2 Bro CC 499.

<sup>4</sup> *Ex p Pye, ex p Dubost* (1811) 18 Ves 140 at 154.

<sup>5</sup> *Powys v Mansfield* (1837) 3 My & Cr 359; *Fowkes v Pascoe* (1875) 10 Ch App 343 at 350, CA. In *Powys v Mansfield* supra, Lord Cottenham referred to the father's, not the parent's, duty, but it is thought that this restricted view would no longer be taken: see note 2 supra. It depends on the circumstances of the particular case: *Re Paradise Motor Co Ltd* [1968] 2 All ER 625 at 629, [1968] 1 WLR 1125 at 1139, CA, per Danckwerts LJ. In a case where the donor is not the parent or in loco parentis, the question of ademption of a gift by will by a subsequent settlement has to be determined by considering the intention apart from presumption: *Re Eardley's Will, Simeon v Freemantle* [1920] 1 Ch 397; *Re Ware, Re Rouse, Ware v Rouse* [1926] WN 163, 70 Sol Jo 691.

<sup>6</sup> Strictly the evidence is of intention by the donor to put himself in loco parentis; from such intention the presumption against double portions arises, and oral evidence is admissible to prove or disprove the facts upon which the presumption is to depend, namely whether, in the language of Lord Eldon in *Ex p Pye, ex p Dubost* (1811) 18 Ves 140, he had meant to put himself in loco parentis: *Powys v Mansfield* (1837) 3 My & Cr 359 at 370 per Lord Cottenham LC; and see *Booker v Allen* (1831) 2 Russ & M 270 at 299.

- 7 *Watson v Watson* (1864) 33 Beav 574. In *Twining v Powell* (1845) 2 Coll 262 the testatrix also referred to the legatee as her adopted child. See also *Campbell v Campbell* (1866) LR 1 Eq 383; cf *Fowkes v Pascoe* (1875) 10 Ch App 343.
- 8 *Booker v Allen* (1831) 2 Russ & M 270.
- 9 *Powys v Mansfield* (1837) 3 My & Cr 359 at 368, 369.
- 10 *Roome v Roome* (1744) 3 Atk 181 at 183; *Powel v Cleaver* (1789) 2 Bro CC 499 at 517; *Perry v Whitehead* (1801) 6 Ves 544 at 547-548; *Lyddon v Ellison* (1854) 19 Beav 565 at 572; *Re Dawson, Swainson v Dawson* [1919] 1 Ch 102, CA; cf *Ellis v Ellis* (1802) 1 Sch & Lef 1; *Pym v Lockyer* (1841) 5 My & Cr 29; *Campbell v Campbell* (1866) LR 1 Eq 383.
- 11 *Lyddon v Ellison* (1854) 19 Beav 565.
- 12 *Brown v Peck* (1758) 1 Eden 140; *Powys v Mansfield* (1837) 3 My & Cr 359.
- 13 See *Shudal v Jekyll* (1743) 2 Atk 516; *Williams v Duke of Bolton* (1768) 1 Dick 405.
- 14 *Grave v Earl of Salisbury* (1784) 1 Bro CC 425; *Perry v Whitehead* (1801) 6 Ves 544; *Ex p Pye, ex p Dubost* (1811) 18 Ves 140.
- 15 In *Re Lawes, Lawes v Lawes* (1881) 20 ChD 81 at 86, CA, Jessel MR treated a father as being in loco parentis towards his illegitimate son. As to the acquisition of parental rights by such a father see now the Children Act 1989 s 4 (as amended); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 139; and as to financial support for children see generally CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 528 et seq.
- 16 See note 2 supra.
- 17 *Shudal v Jekyll* (1743) 2 Atk 516; *Lyddon v Ellison* (1854) 19 Beav 565; *Re Smythies, Weyman v Smythies* [1903] 1 Ch 259.
- 18 *Re Cameron, Phillips v Cameron* [1999] Ch 386, [1999] 2 All ER 924.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(3) SATISFACTION AND ADEMPION/745. Strength of the presumption against double portions in different cases.

#### **745. Strength of the presumption against double portions in different cases.**

The rule against double portions is only a rule of presumption, and the presumption may be rebutted. The strength of the presumption varies according to the nature of the instruments and the order in which they are executed. The presumption is strongest in the case where a testamentary provision for a child is followed by a settlement. In such a case both provisions are still under the testator's control when he executes the later instrument. The presumption is less strong where a settlement which creates an obligation remaining unperformed is followed by a testamentary provision. The testator is not free from the obligation of the settlement when he makes his will, and it is not so readily presumed that he meant the will to take the place of the settlement<sup>1</sup>. Where the settlement precedes the will, a direction in the will to pay debts may be held to include the liability under the settlement so as to rebut the presumption of satisfaction<sup>2</sup>, but only if the liability is of such a nature as properly to constitute a debt<sup>3</sup>.

The strength of the presumption is further reduced when the double provision is contained in consecutive settlements, since in the case of a will the testator is supposed to be disposing of the whole of his property and distributing it among the different objects of his bounty<sup>4</sup>; but it is not so in the case of a settlement. If the first settlement contains a power of revocation which is not exercised, this will be an indication that the provisions are intended to be cumulative<sup>5</sup>.

1 *Lord Chichester v Coventry* (1867) LR 2 HL 71 at 87; *Re Tussaud's Estate, Tussaud v Tussaud* (1878) 9 ChD 363, CA; *Re Cameron, Phillips v Cameron* [1999] Ch 386, [1999] 2 All ER 924. As to this distinction see *Dawson v Dawson* (1867) LR 4 Eq 504 at 512; *Cooper v Macdonald* (1873) LR 16 Eq 258 at 268. See also *Re Poyser* (1908) as reported in [1918] 1 Ch 573n.

2 *Lord Chichester v Coventry* (1867) LR 2 HL 71 at 85, 88; *Dawson v Dawson* (1867) LR 4 Eq 504; *Smyth v Johnston* (1875) 31 LT 876; and see *Lethbridge v Thurlow* (1851) 15 Beav 334; *Re Franklin, Franklin v Franklin* (1907) 52 Sol Jo 12. Where the will precedes the settlement, a direction to pay debts can have no such effect: *Trimmer v Bayne* (1802) 7 Ves 508; *Dawson v Dawson* (1867) LR 4 Eq 504; *Cooper v Macdonald* (1873) LR 16 Eq 258.

3 *Bennett v Houldsworth* (1877) 6 ChD 671; *Re Vernon, Garland v Shaw* (1906) 95 LT 48.

4 *Palmer v Newell* (1855) 20 Beav 32; on appeal (1856) 8 De GM & G 74.

5 *Palmer v Newell* (1855) 20 Beav 32 at 78; and see *Cartwright v Cartwright* [1903] 2 Ch 306 (satisfaction rebutted by the differences in the limitations).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(3) SATISFACTION AND ADEPTION/746. Slight differences do not rebut the presumption.

#### **746. Slight differences do not rebut the presumption.**

Slight differences between the two provisions, such as in the judge's opinion leave the two provisions of substantially the same nature, do not rebut the presumption against double portions<sup>1</sup>. Thus the presumption is not rebutted by slight differences as to the time of payment of the two portions<sup>2</sup>; and sums agreed to be advanced may be satisfied to that extent by a share of residue<sup>3</sup>. Similarly, a bequest of a share of residue may be adeemed pro tanto by a subsequent advance of a specific sum<sup>4</sup>. For this purpose, satisfaction by a gift of residue and ademption of a gift of residue cannot be distinguished<sup>5</sup>.

1 *Weall v Rice* (1831) 2 Russ & M 251 at 268; *Re Cameron, Phillips v Cameron* [1999] Ch 386, [1999] 2 All ER 924.

2 *Davys v Boucher* (1839) 3 Y & C Ex 397; *Hartopp v Hartopp* (1810) 17 Ves 184; *Stevenson v Masson* (1873) LR 17 Eq 78; cf *Lethbridge v Thurlow* (1851) 15 Beav 334.

3 *Schofield v Heap* (1858) 27 Beav 93.

4 *Lady Thynne v Earl of Glengall* (1848) 2 HL Cas 131.

5 *Montefiore v Guedalla* (1859) 1 De GF & J 93 at 101. Where, however, the residue is left to other persons jointly with the children, advances to the children are brought into account only so as to increase the share of residue going to the children (*Meinertzen v Walters* (1872) 7 Ch App 670); and, if the residue is left between a stranger and a single child, the presumption of satisfaction is not admitted at all, since the effect would be to compel the child to bring advances into account for the benefit of the stranger, but not vice versa (*Re Heather, Pumfrey v Fryer* [1906] 2 Ch 230; *Re Vaux, Nicholson v Vaux* [1938] Ch 581, [1938] 2 All ER 177; revsd [1939] Ch 465 at 477; sub nom *Re Vaux, Nicholson v Vaux (No 2)* [1938] 4 All ER 703, CA, without affecting this point).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(3) SATISFACTION AND ADEPTION/747. Gifts must be ejusdem generis.

### 747. Gifts must be ejusdem generis.

The second portion must be of the same kind as (*ejusdem generis* with) the first<sup>1</sup>. Thus a pecuniary legacy is not adeemed by the parent's act in taking his son into partnership and giving him an interest in the business stock<sup>2</sup>. If, however, the parent himself sets a pecuniary value on the property given, or gives it with reference to its pecuniary value, it ceases to be of a different nature for this purpose<sup>3</sup>, and the difference between a gift of money and a gift of stock<sup>4</sup>, or bearer bonds<sup>5</sup>, is disregarded for this purpose. Similarly, land is not to be taken in satisfaction for money<sup>6</sup>, nor money for land<sup>7</sup>, unless the testator estimates the value of the land at a fixed sum and desires it to be made up to a particular amount<sup>8</sup>. An interest subject to a contingency will not be a satisfaction of a vested interest<sup>9</sup> unless the contingency is so remote that it may be disregarded<sup>10</sup>. There can be both an ademption of a gift of residue by a subsequent advancement and satisfaction of a portions debt by a gift of residue<sup>11</sup>.

1 *Re Lacon, Lacon v Lacon* [1891] 2 Ch 482, CA; *Re Aynsley, Kyrle v Turner* [1915] 1 Ch 172 at 176, CA; *Leneham v Wall* [1922] 1 IR 59; *Casimir v Alexander* [2001] WTLR 939 (nature and conditions of inter vivos gift were not such as to raise, or at least were such as to rebut, the presumption against double portions).

2 *Holmes v Holmes* (1783) 1 Bro CC 555; *Re Jaques, Hodgson v Braisby* [1903] 1 Ch 267, CA; dissenting from *Re Vickers, Vickers v Vickers* (1888) 37 ChD 525, where North J considered *Holmes v Holmes* supra overruled by the observations of Jessel MR in *Re Lawes, Lawes v Lawes* (1881) 20 ChD 81 at 87, CA. See PARA 744 note 2 ante.

3 *Bengough v Walker* (1808) 15 Ves 507; *Re Lawes, Lawes v Lawes* (1881) 20 ChD 81, CA; *Re George's Will Trusts, Barclays Bank Ltd v George* [1949] Ch 154, [1948] 2 All ER 1004. The fact that a gift has an element of liability attached to it does not in itself prevent the gift from being a portion. It is rather a matter to be taken into consideration in considering what the value of the gift was: *Re George's Will Trusts, Barclays Bank Ltd v George* supra.

4 *Pym v Lockyer* (1841) 5 My & Cr 29; *Watson v Watson* (1864) 33 Beav 574.

5 *Re Jupp, Harris v Grierson* [1922] 2 Ch 359.

6 *Chaplin v Chaplin* (1734) 3 P Wms 245; cf *Re Aynsley, Kyrle v Turner* [1915] 1 Ch 172, CA.

7 *Bellasis v Uthwatt* (1737) 1 Atk 426 at 428; and see *Davys v Boucher* (1839) 3 Y & C Ex 397.

8 *Lord Chichester v Coventry* (1867) LR 2 HL 71 at 96 per Lord Romilly MR, referring to *Bengough v Walker* (1808) 15 Ves 507.

9 *Bellasis v Uthwatt* (1737) 1 Atk 426; *Spinks v Robins and Cope* (1742) 2 Atk 491; *Hanbury v Hanbury* (1788) 2 Bro CC 352.

10 *Powys v Mansfield* (1837) 3 My & Cr 359 at 374.

11 *Lady Thynne v Earl of Glengall* (1848) 2 HL Cas 131; *Montefiore v Guedalla* (1859) 1 De GF & J 93; *Dawson v Dawson* (1867) LR 4 Eq 504; *Cooper v Macdonald* (1873) LR 16 Eq 258.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(3) SATISFACTION AND ADEPTION/748. Difference in limitations.

## 748. Difference in limitations.

Differences between the limitations in the two provisions will exclude the rule against double portions only where they are so great as to indicate that the donor did not intend the later to be in satisfaction of the earlier<sup>1</sup>. Satisfaction is compatible with greater differences of limitation when the will precedes the settlement, since the testator is at liberty to vary as he pleases the bounty given by his will. Thus, where by his will a parent has given a portion to his daughter absolutely, this may well be satisfied by a settlement under which she takes a life interest. It is simply such a settlement as she might be expected herself to make if she received the portion under the will<sup>2</sup>.

Where the settlement precedes the will<sup>3</sup>, greater weight is given to differences in the limitations. The testator is already under an obligation to dispose of property in the manner defined by the settlement, and his will is no satisfaction unless, in making it, he could have supposed himself to be satisfying that obligation<sup>4</sup>.

1 *Trimmer v Bayne* (1802) 7 Ves 508 at 515.

2 *Earl of Durham v Wharton* (1836) 3 Cl & Fin 146, HL; *Powys v Mansfield* (1837) 3 My & Cr 359; *Lord Chichester v Coventry* (1867) LR 2 HL 71 at 88; *Stevenson v Masson* (1873) LR 17 Eq 78; and see *Re Innes, Barclay v Innes* (1908) 125 LT Jo 60. A legacy given absolutely to a son may be adeemed by a subsequent settlement of money on the son's marriage: *Hopwood v Hopwood* (1859) 7 HL Cas 728. This is not necessarily prevented by a later codicil expressly declaring other portions to be in satisfaction of legacies, but not referring to the legacy in question: *Hopwood v Hopwood* supra. Similarly, where the will settles a sum on a daughter and her children, a subsequent settlement on the daughter and her children will be an ademption, notwithstanding differences in the trusts: *Re Furness, Furness v Stalkartt* [1901] 2 Ch 346.

3 See PARA 745 ante.

4 *Lord Chichester v Coventry* (1867) LR 2 HL 71 at 89. The three leading cases on this subject are *Earl of Durham v Wharton* (1836) 3 Cl & Fin 146, HL; *Lady Thynne v Earl of Glengall* (1848) 2 HL Cas 131; and *Lord Chichester v Coventry* supra.

In *Earl of Durham v Wharton* supra, where the will preceded the settlement, although there were substantial differences in the limitations, the rule against double portions prevailed, as it did in *Lady Thynne v Earl of Glengall* supra and *Russell v St Aubyn* (1876) 2 ChD 398, where the settlement preceded the will and where the differences in the limitations were not very substantial. In *Lord Chichester v Coventry* supra, where the settlement preceded the will, the differences in the trusts were substantial and the presumption of satisfaction was held to be negated; and see *Re Tussaud's Estate, Tussaud v Tussaud* (1878) 9 ChD 363, CA; *Montagu v Earl of Sandwich* (1886) 32 ChD 525, CA; *Re Vernon, Garland v Shaw* (1906) 95 LT 48; *Re Franklin, Franklin v Franklin* (1907) 52 Sol Jo 12.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(3) SATISFACTION AND ADEPTION/749. Difference in beneficiaries.

## 749. Difference in beneficiaries.

A provision by will may be adeemed in whole or in part by a subsequent advance, even where the persons mentioned in the will and those to whom the advance is made are not the same<sup>1</sup>. This difference is a matter to be considered in determining whether or not there is ademption; but, if the decision is in favour of ademption, the ademption is final and affects all the persons within the scope of the testamentary provision<sup>2</sup>. Satisfaction of a settlement by a will is different, and may operate as to certain persons benefited by the settlement and not as to others. Consequently those who benefit both under the settlement and under the will are put to their election, but a beneficiary under the settlement who does not take under the will, as where a daughter's husband takes a life interest under the settlement but not under the will<sup>3</sup>, cannot be put to election; and he retains his right under the settlement<sup>4</sup>.

Conversely, if there are beneficiaries under the will who are not within the settlement, the beneficiaries under both settlement and will must elect. If they elect to take under the will, the provision of the will is substituted for that in the settlement, and the beneficiaries mentioned only in the will are let in to share in the whole property; if they elect against the will, they cannot benefit under the will without compensating the beneficiaries under the will alone for the loss thus caused to them<sup>5</sup>.

1 *Re Cameron, Phillips v Cameron* [1999] Ch 386, [1999] 2 All ER 924 (gift in will to son, inter vivos gift for education of grandson).

2 *Lord Chichester v Coventry* (1867) LR 2 HL 71 at 90; *Twining v Powell* (1845) 2 Coll 262.

3 See *Mayd v Field* (1876) 3 ChD 587.

4 *Lord Chichester v Coventry* (1867) LR 2 HL 71 at 92, 93, 95 per Lord Romilly MR ('if a father, on the marriage of his daughter, should settle £10,000 on her for life, remainder to the children of the marriage, a bequest of £10,000 to that daughter would satisfy her life interest in the £10,000, but would not satisfy or touch the interests of her children'). See *McCarogher v Whieldon* (1867) LR 3 Eq 236; *Mayd v Field* (1876) 3 ChD 587; cf *Bethell v Abraham* (1874) 3 ChD 590n. In *Re Blundell, Blundell v Blundell* [1906] 2 Ch 222, a bequest to a wife absolutely was a satisfaction as to her life interest under a preceding settlement, but not as to the interests of her husband and children, notwithstanding that, under an after-acquired property clause in the settlement, her legacy had to be brought into the settlement. In general, where the will follows the settlement, however, the circumstance that certain persons included in the settlement are not included in the testamentary provision precludes the presumption: *Re Tussaud's Estate, Tussaud v Tussaud* (1878) 9 ChD 363 at 368, CA; and see *Hall v Hill* (1841) 1 Dr & War 94; *Re Vernon, Garland v Shaw* (1906) 95 LT 48. Moreover, where the settlement follows the will, the presumption will not arise, in the absence of express direction, if the persons taking under the several instruments are altogether different. Thus a legacy in favour of a daughter and her children is not adeemed by a subsequent gift in favour of her husband absolutely: *Cooper v Macdonald* (1873) LR 16 Eq 258 at 269; and see *Baugh v Read* (1790) 1 Ves 257; cf *Twining v Powell* (1845) 2 Coll 262.

5 This would have been the case in *Lady Thynne v Earl of Glengall* (1848) 2 HL Cas 131, had there been children of a second marriage: see the hypothesis worked out by Lord Romilly MR in *Lord Chichester v Coventry* (1867) LR 2 HL 71 at 93.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(3) SATISFACTION AND ADEMPATION/750. Admission of oral evidence.

## 750. Admission of oral evidence.

Oral evidence cannot generally be admitted to add to or vary a written instrument<sup>1</sup>; although extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in the interpretation of a will in so far as:

- 119 (1) any part of it is meaningless;
- 120 (2) the language used in any part of it is ambiguous on the face of it;
- 121 (3) evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of the surrounding circumstances<sup>2</sup>.

Where, however, from two written instruments, taken in conjunction with the surrounding circumstances, the court raises a presumption of satisfaction, then oral evidence is admissible to rebut the presumption, and therefore also to support it<sup>3</sup>. If the second instrument contains an expression of intention as to whether there is or is not to be satisfaction, oral evidence will not be admitted to contradict it<sup>4</sup>.

In the case of a will and a settlement the rule is the same whether the will precedes or follows the settlement<sup>5</sup>. Where a disposition has been made by one written instrument, oral evidence may be given of the circumstances of a subsequent transaction which has not been reduced to writing, for the purpose of showing an intention on the donor's part that it should be a satisfaction<sup>6</sup>.

1 It may be given, however, to explain the surrounding circumstances: see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 198.

2 See the Administration of Justice Act 1982 s 21(1), (2); *Re Williams, Wiles v Madgin* [1985] 1 All ER 964, [1985] 1 WLR 905; and WILLS vol 50 (2005 Reissue) PARAS 483, 507. Nothing in the Administration of Justice Act 1982 s 21, however, affects the will of a testator who died before 1 January 1983: ss 73(6)(c), 76(11).

3 *Trimmer v Bayne* (1802) 7 Ves 508; *Kirk v Eddowes* (1844) 3 Hare 509 (and see the cases there referred to); *Hall v Hill* (1841) 1 Dr & War 94; *Curtin v Evans* (1875) 9 IR Eq 553 at 557; *Montagu v Earl of Sandwich* (1886) 32 ChD 525 at 535, CA; *Re Scott, Langton v Scott* [1903] 1 Ch 1, CA (presumption rebutted); and see *Debeze v Mann* (1789) 2 Bro CC 165, 519. In such cases the evidence is not admitted on either side for the purpose of proving, in the first instance, with what intent either writing was made, but for the purpose only of ascertaining whether the presumption which the law has raised be well- or ill-founded: *Kirk v Eddowes* supra at 517 per Wigram V-C; *Re Shields, Corbould-Ellis v Dales* [1912] 1 Ch 591 at 601. In *Weall v Rice* (1831) 2 Russ & M 251 at 268, Leach MR treated extrinsic evidence as being admissible both to raise and to rebut the presumption; and in *Booker v Allen* (1831) 2 Russ & M 270, he admitted extrinsic evidence to raise the presumption where the provisions of the instruments were so different as to prevent it from being raised by intrinsic evidence. The other authorities cited show that the presumption must first be raised on the language of the instruments, and on the relationship of the parties as one of the surrounding circumstances, before oral evidence of intention against or for satisfaction may be admitted; otherwise the oral evidence would be admitted simply to vary the written instrument: *Re Tussaud's Estate, Tussaud v Tussaud* (1878) 9 ChD 363 at 374, CA. These authorities must now, however, be read in the light of the Administration of Justice Act 1982 s 21: see text to note 2 supra.

4 *Kirk v Eddowes* (1844) 3 Hare 509.

5 *Re Tussaud's Estate, Tussaud v Tussaud* (1878) 9 ChD 363 at 373, CA.

6 *Kirk v Eddowes* (1844) 3 Hare 509; *Re Cameron, Phillips v Cameron* [1999] Ch 386, [1999] 2 All ER 924.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(3) SATISFACTION AND ADEMPATION/751. Satisfaction of a debt by a legacy.

## 751. Satisfaction of a debt by a legacy.

Where a testator who is indebted at the time of making his will<sup>1</sup> leaves to his creditor a legacy of a sum equal to or greater than the debt, the legacy is presumed to be a satisfaction of the debt<sup>2</sup>, and the creditor cannot have both his debt and the legacy<sup>3</sup>; and, if the debt is discharged before the testator's death, the legacy will not be payable<sup>4</sup>. There is satisfaction only where the creditor and the legatee are the same. Hence there is no satisfaction where the debt is due to a husband and the legacy is given to his wife<sup>5</sup>, or where the debt is due from the testator as trustee and the legacy is to one of the beneficiaries<sup>6</sup>.

1 A legacy will not be presumed to be a satisfaction of a debt not existing at the date of the will, since an intention to that effect cannot be imputed to the testator: *Fowler v Fowler* (1735) 3 P Wms 353; *Thomas v Bennet* (1725) 2 P Wms 341; *Haynes v Mico* (1781) 1 Bro CC 129 at 131; *Plunkett v Lewis* (1844) 3 Hare 316 at 330. The fact that the debt is created contemporaneously with the will is strong reason against satisfaction: *Horlock v Wiggins*, *Wiggins v Horlock* (1888) 39 ChD 142, CA.

2 The presumption is founded on the maxim *debitor non praesumitur donare*, or that a person should be just before he is bountiful; but, of course, there is in principle no room for such maxims where the debtor leaves sufficient to pay both the debt and the legacy: *Chancey's Case* (1725) 1 P Wms 408; *Fowler v Fowler* (1735) 3 P Wms 353; *Mathews v Mathews* (1755) 2 Ves Sen 635. A legacy given in satisfaction of a debt is liable to abate with other legacies: *Re Wedmore*, *Wedmore v Wedmore* [1907] 2 Ch 277; *Re Whitehead*, *Whitehead v Street* [1913] 2 Ch 56. As to a gift of residue to creditors in proportions corresponding to their debts see *Philips v Philips* (1844) 3 Hare 281.

3 *Talbott v Duke of Shrewsbury* (1714) Prec Ch 394; 2 White & Tud LC (9th Edn) 323; *Re Rattenberry*, *Ray v Grant* [1906] 1 Ch 667; *Ellard v Phelan* [1914] 1 IR 76 (bequest to an employee held to be a satisfaction of wages due at time of testator's death); *Re Haves*, *Haves v Haves* [1951] 2 All ER 928. The rule applies notwithstanding that there is interest then due and unpaid (*Fitzgerald v National Bank Ltd* [1929] 1 KB 394); but a legacy of less amount than the debt is not a satisfaction pro tanto (*Atkinson v Webb* (1704) 2 Vern 478; *Cranmer's Case* (1701) 2 Salk 508; *Eastwood v Vinke* (1731) 2 P Wms 613 at 616 (affd sub nom *Eastgood v Styles* (1732) Kel W 36); *Lady Thynne v Earl of Glengall* (1848) 2 HL Cas 131 at 153; *Gee v Liddell* (1866) 35 Beav 621; and see *Graham v Graham* (1749) 1 Ves Sen 262; *Bor v Bor* (1756) 3 Bro Parl Cas 167 at 179, HL), unless there is evidence that the legacy was intended as part payment and that the creditor assented (*Hammond v Smith* (1864) 33 Beav 452).

4 *Re Fletcher*, *Gillings v Fletcher* (1888) 38 ChD 373.

5 *Hall v Hill* (1841) 1 Dr & War 94.

6 *Fairer v Park* (1876) 3 ChD 309; and see *Smith v Smith* (1861) 3 Giff 263 at 272.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(3) SATISFACTION AND ADEMPION/752. Rebuttal of presumption of satisfaction of a debt by a legacy.

## 752. Rebuttal of presumption of satisfaction of a debt by a legacy.

The presumption that a debt is satisfied by a legacy<sup>1</sup> is not favoured by the court, and it will be rebutted by slight circumstances, whether appearing on the will or incident to the nature of the debt and of the legacy, which suggest that the testator did not intend the legacy to operate as a satisfaction<sup>2</sup>.

Thus it will be rebutted where the will contains a direction for the payment of debts and legacies<sup>3</sup>, and even where the direction is only for payment of debts<sup>4</sup>, or where the will states a particular motive for the legacy other than satisfaction of the debt<sup>5</sup>.

The presumption will also be rebutted where the legacy is so different as not to be a proper equivalent for the debt, as where it is payable at a later time than the debt, so as to be less advantageous to the creditor<sup>6</sup>, or where it is different in kind. The difference may exist either in the things themselves, as where they are not of the same kind<sup>7</sup>, or in their incidents, as where the legacy is either contingent<sup>8</sup> or of uncertain amount<sup>9</sup>.

The presumption may be excluded by differences in the title to the debt and legacy, as where the debt and the legacy are secured by different charges on property<sup>10</sup>, or the debt and the legacy are vested in different trustees<sup>11</sup>, or the debt is due on a negotiable instrument<sup>12</sup>. Where a testator is liable as trustee for a breach of trust, a bequest of money for the purposes of the trust will prima facie be a satisfaction of the breach of trust<sup>13</sup>, and sums charged on the testator's estate may be satisfied by a legacy to the owner of the charge<sup>14</sup>. A declaration in the will that certain legacies are in satisfaction of debts will assist to rebut the presumption of satisfaction in the case of a debt not so mentioned<sup>15</sup>.

Since the presumption of satisfaction of a debt by a legacy is opposed to the language of the will, oral evidence is admissible, as in other cases of satisfaction, to rebut it and also to affirm it<sup>16</sup>. The mere fact that the creditor-legatee is also appointed executor is irrelevant<sup>17</sup>.

1 See PARA 751 ante.

2 *Lady Thynne v Earl of Glengall* (1848) 2 HL Cas 131; *Richardson v Greese* (1743) 3 Atk 65 at 68; *Hinchcliffe v Hinchcliffe* (1797) 3 Ves 516 at 529; *Re Horlock, Calham v Smith* [1895] 1 Ch 516 at 519. The court will 'rely on the minutest shade of difference to escape from that false principle': *Hassell v Hawkins* (1859) 4 Drew 468 at 470. There is no difference in this respect between debts due to the testator's children and debts due to strangers: *Tolson v Collins* (1799) 4 Ves 483; *Edmunds v Low* (1857) 3 K & J 318; and see *Stocken v Stocken* (1831) 4 Sim 152; on appeal (1838) 4 My & Cr 95.

3 *Chancey's Case* (1725) 1 P Wms 408; *Richardson v Greese* (1743) 3 Atk 65; *Field v Mostin* (1778) 2 Dick 543; *Jefferies v Michell* (1855) 20 Beav 15; *Hassell v Hawkins* (1859) 4 Drew 468. Where, however, the will contains such a direction, and the testator subsequently contracts a debt and then by codicil leaves an equal or greater legacy to the creditor, the presumption is not rebutted: *Gaynon v Wood* (1759) 1 Dick 331.

4 *Re Huish, Bradshaw v Huish* (1889) 43 ChD 260; *Re Manners, Public Trustee v Manners* [1949] Ch 613, [1949] 2 All ER 201, CA; *Lahay v Brown* (1957) 8 DLR (2d) 728, [1957] OWR 210, Ont CA; and see *Cole v Willard* (1858) 25 Beav 568; *Pinchin v Simms* (1861) 30 Beav 119; *Dawson v Dawson* (1867) LR 4 Eq 504 at 514; *Atkinson v Littlewood* (1874) LR 18 Eq 595 at 604; *Re Stibbe, Cleverley v Stibbe* (1946) 175 LT 198; cf *Glover v Hartcup* (1864) 34 Beav 74; *Lord Chichester v Coventry* (1867) LR 2 HL 71. It had previously been held that the mere direction to pay debts was not enough to rebut the presumption (*Edmunds v Low* (1857) 3 K & J 318), although it was an element to be considered in regard to the question of intention (*Rowe v Rowe* (1848) 2 De G & Sm 294 at 298). The direction to pay debts covers the testator's indebtedness on a covenant in favour of his

wife or other beneficiary, even though payment under the covenant is not to be made until after his death (*Cole v Willard* supra; *Atkinson v Littlewood* supra at 605; and see *Lord Chichester v Coventry* supra at 85; contra *Wathen v Smith* (1819) 4 Madd 325), although on the circumstances of the case it may appear that the testator did not intend the liability on the covenant to his wife to be treated as a debt within the direction to pay debts, and then it is discharged by the bequest (*Re Hall, Hope v Hall* [1918] 1 Ch 562).

5 See *Mathews v Mathews* (1755) 2 Ves Sen 635.

6 Thus, where the debt is due at the testator's death, the legacy must not be made payable at a fixed date after the death (*Nicholls v Judson* (1742) 2 Atk 300; *Clark v Sewell* (1744) 3 Atk 96; *Re Roberts, Roberts v Parry* (1902) 50 WR 469); and, where the debt is due at a fixed date after the death, the legacy must not be made payable at a later date (*Haynes v Mico* (1781) 1 Bro CC 129; and see *Jeacock v Falkener* (1783) 1 Bro CC 295 at 297). Moreover, if the debt is due at a fixed date after death and the legacy is given without a fixed date, there is no satisfaction, since the legacy is not, according to the ordinary rule, payable for a year (*Re Horlock, Calham v Smith* [1895] 1 Ch 516); and similarly, where an annuity given by deed is payable at a fixed date within the year and an annuity is given by will generally (*Re Dowse, Dowse v Glass* (1881) 50 LJ Ch 285; and see *Re Stibbe, Cleverley v Stibbe* (1946) 175 LT 198) or different fixed times are settled for the two annuities (*Atkinson v Webb* (1704) Prec Ch 236; *Hales v Darell* (1840) 3 Beav 324). If the debt is payable at the death, however, and the legacy is given generally, the fact that the legacy may not be paid for a year does not rebut the presumption of satisfaction (*Re Rattenberry, Ray v Grant* [1906] 1 Ch 667); and, since a legacy so given in satisfaction of a debt carries interest from the death (*Clark v Sewell* supra at 99), there is no difference as to interest which will rebut the presumption (*Re Rattenberry, Ray v Grant* supra). It is submitted that, in so far as *Re Horlock, Calham v Smith* supra is inconsistent with *Re Rattenberry, Ray v Grant* supra, the latter decision is to be preferred. See also *Fitzgerald v National Bank Ltd* [1929] 1 KB 394 (debt carrying interest, some of which was due at the date of death, satisfied by a legacy of the capital sum). An acceleration in the date of payment is consistent with satisfaction: *Wathen v Smith* (1819) 4 Madd 325 at 332. It has been recognised that the exceptions, equally with the rule, are unsatisfactory: *Re Horlock, Calham v Smith* supra.

7 Thus a devise of land is not a satisfaction of a debt: *Eastwood v Vinke* (1731) 2 P Wms 613 at 616; affd sub nom *Eastwood v Styles* (1732) Kel W 36; *Byde v Byde* (1761) 1 Cox Eq Cas 44 at 48; and see *Barret v Beckford* (1750) 1 Ves Sen 519; *Alleyn v Alleyn* (1750) 2 Ves Sen 37; *Forsight v Grant* (1791) 1 Ves 298; *Richardson v Elphinstone* (1794) 2 Ves 463.

8 *Crompton v Sale* (1729) 2 P Wms 553; *Mathews v Mathews* (1755) 2 Ves Sen 635; *Tolson v Collins* (1799) 4 Ves 483; *Sanford v Irby* (1825) 4 LJOS Ch 23; *Crichton v Crichton* [1895] 2 Ch 853; on appeal [1896] 1 Ch 870, CA. In *Re Van Den Bergh v Simpson* [1948] 1 All ER 935 the presumption was rebutted principally because an annuity given by will, unlike the annuity previously given by deed, was liable to determine if the donee attempted to do anything by way of alienating or charging it.

9 Thus a residue or a share of residue is not a satisfaction of a debt: *Barret v Beckford* (1750) 1 Ves Sen 519; *Devese v Pontet* (1785) 1 Cox Eq Cas 188 at 192; *Lady Thynne v Earl of Glengall* (1848) 2 HL Cas 131 at 155. There may be satisfaction of a debt of unascertained amount (*Edmunds v Low* (1857) 3 K & J 318 at 323; *Smith v Smith* (1861) 3 Giff 263 at 269), unless it is on an open account in respect of which nothing, so far as the testator knows, may be owing (*Rawlins v Powell* (1718) 1 P Wms 297).

10 *Bartlett v Gillard* (1827) 3 Russ 149; *Hales v Darell* (1840) 3 Beav 324; and see *Re Stibbe, Cleverley v Stibbe* (1946) 175 LT 198; cf *Atkinson v Littlewood* (1874) LR 18 Eq 595; *Re Haves, Haves v Haves* [1951] 2 All ER 928. In *Atkinson v Webb* (1704) 2 Vern 478 the debt was free of taxes while the legacy was not.

11 *Pinchin v Simms* (1861) 30 Beav 119; contra, semble, *Atkinson v Littlewood* (1874) LR 18 Eq 595.

12 *Carr v Eastabrooke* (1797) 3 Ves 561; *Re Roberts, Roberts v Parry* (1902) 50 WR 469. Formerly, the presumption was excluded where the debt belonged to a married woman for her separate use and the legacy was not so given: *Bartlett v Gillard* (1827) 3 Russ 149 at 156; *Fourdrin v Gowdey* (1834) 3 My & K 383 at 410; *Rowe v Rowe* (1848) 2 De G & Sm 294 at 298; *Fairer v Park* (1876) 3 ChD 309 at 314; contra *Atkinson v Littlewood* (1874) LR 18 Eq 595. As to the effect of the marriage of a woman who was creditor-legatee, whereby the debt might formerly become payable to her husband, see *Edmunds v Low* (1857) 3 K & J 318.

13 *Bensusan v Nehemias* (1851) 4 De G & Sm 381.

14 *Shadbolt v Vanderplank* (1861) 29 Beav 405.

15 *Atkinson v Webb* (1704) Prec Ch 236; *Jeacock v Falkener* (1783) 1 Bro CC 295 at 297; *Charlton v West* (1861) 30 Beav 124.

16 See *Plunkett v Lewis* (1844) 3 Hare 316 at 323; *Hall v Hill* (1841) 1 Dr & War 94 at 122. In *Fowler v Fowler* (1735) 3 P Wms 353 such evidence was considered not admissible, but it is to be rejected only when the

intention in favour of satisfaction is expressed in the will itself: see *Hall v Hill* supra. In *Wallace v Pomfret* (1805) 11 Ves 542 this distinction was overlooked. As to the admission of oral evidence generally see PARA 750 ante.

17     *Re Rattenberry, Ray v Grant* [1906] 1 Ch 667.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(3) SATISFACTION AND ADEPTION/753. Debt from parent to child.

### **753. Debt from parent to child.**

Where a debt from a parent to a child exists, an advancement in the parent's lifetime, upon the child's marriage or on some other occasion, of a portion equal to or exceeding the debt is prima facie a satisfaction of the debt<sup>1</sup>. The presumption may be rebutted by circumstances showing that satisfaction was not intended<sup>2</sup>; but it will not be rebutted merely because the gift is expressed to be in consideration of natural love and affection or, in the case of a gift on the marriage of a daughter, because her husband was ignorant of her rights<sup>3</sup>.

1 *Plunkett v Lewis* (1844) 3 Hare 316; *Reade v Reade* (1881) 9 LR Ir 409, CA; and see *Wood v Briant* (1742) 2 Atk 521; *Seed v Bradford* (1750) 1 Ves Sen 501; *Chave v Farrant* (1810) 18 Ves 8; cf *Hardingham v Thomas* (1854) 2 Drew 353. The advancement must be subsequent to the debt: *Plunkett v Lewis* supra at 330. As to the possibility of the doctrine applying where there is not the relationship of parent and child see *Drewe v Bidgood* (1825) 2 Sim & St 424; *Goldsmid v Goldsmid* (1818) 1 Wils Ch 140 at 149 per Plumer MR.

2 Eg where the gift is of less amount, or uncertain or contingent in its nature: *Crichton v Crichton* [1895] 2 Ch 853; revsd in part [1896] 1 Ch 870, CA. As to the circumstances which will rebut the presumption see *Crichton v Crichton* supra.

3 *Plunkett v Lewis* (1844) 3 Hare 316.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(4) PERFORMANCE/754. Performance of covenant to purchase land.

## (4) PERFORMANCE

### 754. Performance of covenant to purchase land.

The equitable doctrine of performance is concerned with notional rather than actual performance<sup>1</sup>. A person under an obligation who does an act which is suitable to be the means of performing the obligation is presumed in equity to have done the act with that intention<sup>2</sup>. Thus, where a person covenants to purchase and settle land<sup>3</sup> and afterwards purchases land which is suitable to be the subject of the settlement, but does not settle it, it is presumed that he purchased it with the intention of performing his covenant<sup>4</sup>; and the purchase operates as a satisfaction of the covenant<sup>5</sup> either entirely or, if the land purchased is less in value than the amount covenanted to be laid out, to that extent<sup>6</sup>.

1 Cf the doctrine of conversion: see PARA 701 et seq ante.

2 This appears to be expressed in the maxim 'equity imputes an intention to fulfil an obligation': see *Tubbs v Broadwood* (1831) 2 Russ & M 487 at 493 per Lord Brougham LC.

3 It is the same where a person covenants to convey and settle land (*Deacon v Smith* (1746) 3 Atk 323), or where the obligation to purchase arises under a statute (*Tubbs v Broadwood* (1831) 2 Russ & M 487 at 493).

4 *Lechmere v Lady Lechmere* (1735) Cas temp Talb 80; 2 White & Tud LC (9th Edn) 349. The principle is that 'where a man covenants to do an act, and he does an act which may be converted to a completion of this covenant, it shall be supposed that he meant to complete it': *Sowden v Sowden* (1785) 1 Cox Eq Cas 165 at 166 per Lord Kenyon MR; and see *Weyland v Weyland* (1742) 2 Atk 632; *Perry v Phelps* (1798) 4 Ves 108 at 116; *Tubbs v Broadwood* (1831) 2 Russ & M 487 at 493. A purchase of land will be a performance even if the covenant was to settle land or a rentcharge of a specified annual value: *Deacon v Smith* (1746) 3 Atk 323. The principle applies, with yet stronger reason, where trustees hold funds subject to investment in land and a purchase by them will be taken to be a performance of the trust: *Mathias v Mathias* (1858) 3 Sm & G 552. As to a purchase by a beneficiary who has obtained the money from the trustees see *Lench v Lench* (1805) 10 Ves 511. Expenditure by a tenant for life in permanent improvements to the settled land will not, however, be a satisfaction of a covenant to pay money to the trustees: *Horlock v Smith* (1853) 17 Beav 572; and see *Wiles v Gresham* (1854) 2 Drew 258; affd 5 De GM & G 770.

Formerly, if he died intestate as to that land, it would be treated, as against his heir-at-law, as being bound by the trusts of the settlement: *Deacon v Smith* (1746) 3 Atk 323; *Garthshore v Chalie* (1804) 10 Ves 1 at 18. This would be so now as against his administrator: see the Administration of Estates Act 1925 ss 1, 33 (as amended); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 555 et seq.

5 *Wilcocks v Wilcocks* (1706) 2 Vern 558. Quaere whether the doctrine might apply since 1925 in a case where the surviving spouse takes a life interest in half the residuary estate under the Administration of Estates Act 1925 ss 46, 49 (as amended): see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 615 et seq.

6 *Lechmere v Earl of Carlisle* (1735) 3 P Wms 211; on appeal *Lechmere v Lady Lechmere* (1735) Cas temp Talb 80; 2 White & Tud LC (9th Edn) 349.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(4) PERFORMANCE/755. When the presumption is rebutted.

### 755. When the presumption is rebutted.

The presumption in favour of performance arises only where the land is purchased subsequently to the covenant<sup>1</sup> and the interest purchased is of the same nature as that specified in the covenant<sup>2</sup>. It is not rebutted, however, by the fact that the purchase is not a literal compliance with the terms of the covenant. Thus, where the covenant requires that the purchase is to be made with the trustees' consent<sup>3</sup>, or that the money is to be paid to the trustees to be applied by them in the purchase of land<sup>4</sup>, a purchase by the settlor himself without reference to the trustees is a performance; and it is the same where the land is purchased at different times<sup>5</sup>. The presumption of intention is not rebutted by the fact that the settlor has mortgaged the land; but the mortgagee's title is not affected, and it is only the equity of redemption which is subject to the settlement<sup>6</sup>. Moreover, the trusts do not create a charge upon the land during the settlor's lifetime<sup>7</sup>. It is only when he has died without completing the settlement by conveyance to the trustees that the doctrine of performance applies so as to bring the land into the settlement. Where the purchase is treated as performance, the value of the land is taken to be the price paid for it, provided the purchase is in good faith<sup>8</sup>.

1 *Lechmere v Earl of Carlisle* (1735) 3 P Wms 211.

2 Thus, purchase of leaseholds for life, or the reversion expectant on such leaseholds, is not a performance of a covenant to purchase estates in fee simple in possession (*Lechmere v Earl of Carlisle* (1735) 3 P Wms 211; and see *Lewis v Hill* (1749) 1 Ves Sen 274), although a reversion on leaseholds for life may suffice if there is only one life outstanding (*Deacon v Smith* (1746) 3 Atk 323). A purchase of a moiety of a house was not a performance of a covenant to purchase land of inheritance (*Pinnel v Hallet* (1751) Amb 106); and purchase of copyholds was not a performance of a covenant to settle freeholds (*A-G v Whorwood* (1750) 1 Ves Sen 534 at 541; contra *Wilks v Wilks* (1713) 5 Vin Abr 293; Sugden, Law of Vendors and Purchasers (14th Edn, 1862) p 710), at any rate when the settlement was in favour of a tenant for life without impeachment of waste (*Pinnel v Hallet* supra).

3 *Deacon v Smith* (1746) 3 Atk 323.

4 *Sowden v Sowden* (1785) 1 Cox Eq Cas 165.

5 *Lechmere v Earl of Carlisle* (1735) 3 P Wms 211; on appeal *Lechmere v Lady Lechmere* (1735) Cas temp Talb 80; *Deacon v Smith* (1746) 3 Atk 323.

6 *Re Symes, ex p Poole* (1847) De G 581. However, according to a dictum of Lord Hardwicke in *Deacon v Smith* (1746) 3 Atk 323 at 327, a subsequent sale or mortgage shows an intention that the land is not to be bound by the articles, although not where the land is purchased subject to a mortgage.

7 *Countess of Mornington v Keane* (1858) 2 De G & J 292; cf *Wellesley v Wellesley* (1839) 4 My & Cr 561. As to covenants affecting after-acquired property see *Tailby v Official Receiver* (1888) 13 App Cas 523 at 548, HL; and PARA 645 ante. A covenant to settle specific land already acquired binds it, including where it has only been contracted for: *Warde v Warde* (1852) 16 Beav 103. On a subsequent exchange of the land for other land and a sum of money, the land will be taken in substitution, and the money will be a specialty debt: *Powdrell v Jones* (1854) 2 Sm & G 305.

8 See *Pinnel v Hallet* (1751) Amb 106; *Lord Tyrconnell v Duke of Ancaster* (1754) Amb 237; cf *Wace v Bickerton* (1850) 3 De G & Sm 751.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(4) PERFORMANCE/756. Performance by intestacy.

## 756. Performance by intestacy.

The doctrine of performance has been extended to the case where a person is under a covenant to provide money at or after his death, and upon his death intestate a share of his estate devolves upon the covenantee<sup>1</sup>; and the same applies where the covenantee is his wife<sup>2</sup>. This operates as a performance of the covenant either in whole or in part, according to the amount received under the intestacy, although the share of residue is not necessarily payable until the end of a year from the death, while the money due under the covenant is payable earlier<sup>3</sup>. It is immaterial whether the covenant is that the covenantor is to leave, or that his executors are to pay<sup>4</sup>, but the principle does not apply where the money has become due in the covenantor's lifetime, so that a claim could have been brought for breach of covenant<sup>5</sup>, or where the benefit under the covenant is an annuity or life interest only<sup>6</sup>.

Conversely, where a husband had covenanted to leave or pay money on his death and died intestate, payment of the covenanted amount might bar any claim by his widow to share beneficially in his estate<sup>7</sup> as well<sup>8</sup>; and a settlement of property on trust might, if so expressed, bar a widow's claim on her deceased husband's estate on his intestacy<sup>9</sup>.

1 *Blandy v Widmore* (1715) 1 P Wms 324; 2 White & Tud LC (9th Edn) 357. The principle has been applied to a covenant to exercise a limited testamentary power so that, on non-exercise of the power, the covenant is satisfied by the covenantee's receiving the amount in default of appointment: *Thacker v Key* (1869) LR 8 Eq 408 at 415. As to the validity of such a covenant, however, see *Palmer v Locke* (1880) 15 ChD 294, CA; *Re Evered, Molineux v Evered* [1910] 2 Ch 147 at 156, CA; and see POWERS vol 36(2) (Reissue) PARA 285.

2 *Lee v Cox and D'Aranda* (1747) 3 Atk 419; sub nom *Lee v D'Aranda* (1747) 1 Ves Sen 1.

3 *Garthshore v Chalie* (1804) 10 Ves 1 at 7. The amount received under the intestacy included the sum of £500 which the widow took, if there were no issue of the husband, under the Intestates' Estates Act 1890 (repealed); and see *Re Hogan, Hogan v Hogan* (1901) 1 IR 168. It would include the amount which the widow now takes under the Administration of Estates Act 1925 s 46(1)(i) (as substituted and amended); as to the effect of this provision see now s 46(2A) (as added); and see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 591 et seq; and cf para 712 note 2 ante.

4 *Lee v Cox and D'Aranda* (1747) 3 Atk 419; sub nom *Lee v D'Aranda* (1747) 1 Ves Sen 1.

5 *Oliver v Brickland* (1732) cited in 3 Atk 419 at 420; *Lee v Cox and D'Aranda* (1747) 3 Atk 419; sub nom *Lee v D'Aranda* (1747) 1 Ves Sen 1; and see *Lang v Lang* (1837) 8 Sim 451.

6 *Couch v Stratton* (1799) 4 Ves 391; *Salisbury v Salisbury* (1848) 6 Hare 526.

7 *Benson v Bellasis* (1683) 2 Rep Ch 252; *Davila v Davila* (1716) 2 Vern 724; *Earl of Buckinghamshire v Drury* (1761) 2 Eden 60, HL (minor barring herself of a distributive share on her husband's intestacy); cf *Seaton v Seaton* (1888) 13 App Cas 61 at 67, HL, per Lord Herschell. A settlement might have to be read as a whole to ascertain what was intended to be barred: *Colleton v Garth* (1833) 6 Sim 19. The claim on intestacy might not be barred if there were breach in the intestate's lifetime of a covenant to be performed during the lifetime (see the cases cited in note 5 supra), and the widow could take both a life interest in the estate pursuant to a covenant and also her distributive share on intestacy, owing to the different natures of the interests: *Young v Young* (1871) IR 5 Eq 615; and see notes 3, 6 supra. See further EXECUTORS AND ADMINISTRATORS, particularly as regards property given by will in satisfaction of rights on intestacy.

8 *Lee v Cox and D'Aranda* (1747) 3 Atk 419; sub nom *Lee v D'Aranda* (1747) 1 Ves Sen 1; *Garthshore v Chalie* (1804) 10 Ves 1. Thus the widow might be put to election: *East v Coggs* (1709) 2 Eq Cas Abr 275 pl 3; *Glover v Bates* (1739) 1 Atk 439. It did not matter whether the intestacy had arisen by the husband's will becoming inoperative or because he had died without leaving a will: see *Goldsmid v Goldsmid* (1818) 1 Swan 211.

9     *Gurly v Gurly* (1842) 8 Cl & Fin 743, HL; *Thompson v Watts* (1862) 2 John & H 291. An advancement under a court order from the estate of a person mentally disordered may be part of a beneficiary's share on that person's intestacy, but the beneficiary's children may not be bound to bring into hotchpot the amount of the advance if the beneficiary died in that person's lifetime: *Re Gist, Gist v Timbrill* [1906] 2 Ch 280, CA.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(4) PERFORMANCE/757. Performance by testamentary provision.

### **757. Performance by testamentary provision.**

If a covenantor who has covenanted to provide money at or after his death bequeaths a legacy to the covenantee, the legacy will not be performance of the covenant unless it is shown to have been given with that intention<sup>1</sup>.

<sup>1</sup> *Haynes v Mico* (1781) 1 Bro CC 129; *Devese v Pontet* (1785) Prec Ch 240n. See these cases discussed in *Garthshore v Chalie* (1804) 10 Ves 1; *Goldsmid v Goldsmid* (1818) 1 Swan 211 at 218; and see *Wood v Wood* (1844) 7 Beav 183. It was held in *Re Hall, Hope v Hall* [1918] 1 Ch 562 that an intention in favour of performance was shown. As to the satisfaction of debts by legacies see also PARA 751 ante.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(5) MARSHALLING/758. The doctrine of marshalling.

## (5) MARSHALLING

### 758. The doctrine of marshalling.

Where one claimant, A, has two funds, X and Y, to which he may resort for satisfaction of his claim, whether legal or equitable, and another claimant, B, may resort to only one of these funds, Y, equity interposes so as to secure that A shall not by resorting to Y disappoint B. Consequently, if the matter is under the court's control, A will be required in the first place to satisfy himself out of X, and to resort to Y in case of deficiency only; and, if A has already been paid out of Y, the court will allow B to stand in his place as against X<sup>1</sup>. This is known as the doctrine of marshalling<sup>2</sup>, and is adopted in order to prevent one claimant depriving another claimant of his security<sup>3</sup>. Furthermore, where each of the two funds has been assigned or charged by the debtor to a different subsequent claimant, equity interposes so as to secure that the claim of the first claimant is borne by the two funds rateably<sup>4</sup>.

1 The court does not, however, interfere with the first incumbrancer's right to satisfy himself out of the first security available: *Wallis v Woodyear* (1855) 2 Jur NS 179; *Smit International Zeesleepen Bergingsbedriff BV v Selco Salvage Ltd* [1988] 2 Lloyd's Rep 398; and see *Binns v Nichols* (1866) LR 2 Eq 256. The doctrine of marshalling has been applied by analogy where brokers pledge a client's securities with their own to a bank to secure an overdraft: *Re Burge, Woodall & Co, ex p Skyrme* [1912] 1 KB 393. There was no case for marshalling in *Re Bank of Credit and Commerce International SA (No 8)* [1996] Ch 245, [1996] 2 All ER 121, CA; affd [1998] AC 214, [1997] 4 All ER 568, HL.

2 The doctrine of marshalling is applied chiefly in regard to securities and to the administration of estates.

3 'A person having two funds shall not by his election disappoint the party having only one fund; and equity, to satisfy both, will throw him, who has two funds, upon that which can be affected by him only, to the intent that the only fund to which the other has access may remain clear to him': *Aldrich v Cooper* (1803) 8 Ves 382 at 395 per Lord Eldon LC. 'In the sense of a court of equity, the marshalling of assets is such an arrangement of the different funds under administration as shall enable all the parties having equities thereon to receive their due proportion, notwithstanding any intervening interests, liens, or other claims of particular persons to prior satisfaction out of a portion of those funds': Story, *Equity Jurisprudence* s 558. Cf *Re Cohen, National Provincial Bank Ltd v Katz* [1960] Ch 179 at 189-190, [1959] 3 All ER 740 at 744-745 per Danckwerts J, where the statements of principle supra were referred to and applied. As to the general principle see *Clifton v Burt* (1720) 1 P Wms 678, and reporter's note at 679; *Lanoy v Duke and Duchess of Athol* (1742) 2 Atk 444 at 446; *Trimmer v Bayne* (1803) 9 Ves 209; *Selby v Selby* (1828) 4 Russ 336. As to the application of the doctrine in favour of persons entitled under a will to rentcharges out of land subject to a mortgage see *Re Fry, Fry v Fry* [1912] 2 Ch 86; and as to the position where a broker who has pledged his customer's securities with his own becomes bankrupt see *Re Burge, Woodall & Co, ex p Skyrme* [1912] 1 KB 393.

4 *Smith International Zeesleepen Bergingsbedriff BV v Selco Salvage Ltd* [1988] 2 Lloyd's Rep 398 at 405 per Warner J.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(5) MARSHALLING/759. Application of doctrine of marshalling.

## 759. Application of doctrine of marshalling.

Generally, three conditions must be satisfied in order that the doctrine of marshalling may be applied as regards claims by creditors:

- 122 (1) the claims must be against a single debtor; if one creditor has a claim against C and D, and another creditor has a claim against D only, the latter creditor may not require the former to resort to C unless the liability is such that D could throw the primary liability on C, for example where C and D are principal and surety<sup>1</sup>;
- 123 (2) the two funds must be at the debtor's disposal; if they are not, the persons interested in the fund not under the debtor's control have a right to throw his debts on the other fund which is under his control, and against them there is no marshalling<sup>2</sup>;
- 124 (3) the two funds must be in existence when the question of marshalling arises<sup>3</sup>.

The doctrine will be applied in favour of volunteers<sup>4</sup>. Hence, if a settlor, after the settlement, creates a mortgage on the settled property so as to give it priority over the settlement<sup>5</sup>, his unsettled property will be marshalled in favour of the beneficiaries under the settlement, and the mortgage debt thrown on that property<sup>6</sup>. The doctrine will not, however, be applied to the prejudice of third persons<sup>7</sup>, even if they are volunteers; and, where estates X, Y and Z belong to the same owner and are subject to mortgages, and he executes a voluntary settlement of Z and then creates a further mortgage on Y alone, the second mortgagee of Y is not entitled to marshal so as to disappoint the beneficiaries under the settlement<sup>8</sup>.

1 *Ex p Kendall* (1811) 17 Ves 514 at 520; and see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1136.

2 'To authorise marshalling, it is obviously necessary not only that a claim should exist against a fund, subject in common with another fund to a paramount liability; but also that those interested in that other fund should not have a right to throw liability on the fund of the claimant': *Douglas v Cooksey* (1868) IR 2 Eq 311 at 315 per Walsh MR. Similarly, where a debtor is bound to exonerate one fund, a person claiming through him has no right to have that fund marshalled in his favour. 'It would be utterly impossible to apply the doctrine [of marshalling] to a case where the creditor with a right against only one fund is in truth himself bound to the party entitled to the other security': *Dolphin v Aylward* (1870) LR 4 HL 486 at 505 per Lord Westbury, meaning, apparently, 'to the party entitled to the property subject to the other security'. On a similar principle, where a testator has created a special fund for payment of debts, taxes on his estate and other expenses, the balance being divisible among legatees, and has settled the residue, and the special fund is deficient, the liabilities payable out of it must be paid rateably, and they cannot by marshalling be paid in full so as to throw the deficiency on residue: *Re Townley, Public Trustee v Alder* [1922] 1 Ch 154.

3 *Re Professional Life Assurance Co* (1867) LR 3 Eq 668 at 680; affd 3 Ch App 167; and see *Re International Life Assurance Society* (1876) 2 ChD 476, CA.

4 *Lomas v Wright* (1833) 2 My & K 769. This does not apply if their titles confine them to different properties: *Boazman v Johnston* (1830) 3 Sim 377.

5 Formerly he could do this, notwithstanding that the mortgagee took with notice of the settlement (*Doe d Newman v Rusham* (1852) 17 QB 723), but under the Law of Property Act 1925 s 173(2) (see MORTGAGE vol 77 (2010) PARAS 508, 632 et seq), the mortgagee will not obtain priority unless he takes the legal estate without notice.

6 *Hales v Cox* (1863) 32 Beav 118; *Mallott v Wilson* [1903] 2 Ch 494 at 505.



7 See *Averall v Wade* (1835) L & G temp Sugd 252; *Hughes v Williams* (1852) 3 Mac & G 683; cf *Ker v Ker* (1869) IR 4 Eq 15. A surety for a mortgage debt who pays off the debt and takes a transfer of the security can hold it against another mortgagee claiming to marshal, but only to the extent of the debt and of costs properly incurred: *South v Bloxam* (1865) 2 Hem & M 457; and see *Dixon v Steel* [1901] 2 Ch 602. As to the liability of the assignee of part of the mortgaged property to contribute to the debt see *Ker v Ker* supra; *Re Darby's Estate*, *Rendall v Darby* [1907] 2 Ch 465; *Re Best*, *Parker v Best* [1924] 1 Ch 42; and MORTGAGE vol 77 (2010) PARA 637.

8 *Aldridge v Forbes* (1839) 9 LJ Ch 37; *Dolphin v Aylward* (1870) LR 4 HL 486 at 501. As to unsecured creditors see *Anstey v Newman* (1870) 39 LJ Ch 769.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(5) MARSHALLING/760. Marshalling of securities.

## 760. Marshalling of securities.

If the owner of two properties mortgages both to the same person, and afterwards mortgages only one to a second mortgagee, the court will marshal the two properties so as to throw the first mortgage as far as possible on the property not included in the second mortgage<sup>1</sup>. This principle applies whatever the nature of the estates<sup>2</sup>, and it extends to charges<sup>3</sup> and equitable liens<sup>4</sup>. In accordance, however, with the rule that marshalling will not be allowed to the prejudice of a third party, where two estates, X and Y, are mortgaged to A and X is mortgaged to B, and then Y is mortgaged to C, B cannot require A to satisfy himself out of Y and so exclude C, but A must satisfy himself rateably out of the two estates<sup>5</sup>. If, however, C's mortgage is expressly subject to prior satisfaction of A's and B's debts, B is entitled to marshal<sup>6</sup>.

1 See *Lanoy v Duke and Duchess of Athol* (1742) 2 Atk 444 per Lord Hardwicke LC; *Baldwin v Belcher, Re Cornwall* (1842) 3 Dr & War 173 at 176; *Re Roddy's Estate, ex p Fitzgerald* (1861) 11 I Ch R 369; *Gibson v Seagrim* (1855) 20 Beav 614; *Webb v Smith* (1885) 30 ChD 192, CA. In *Lanoy v Duke and Duchess of Athol* supra it was said that the second mortgage must be without notice of the first, but notice is not material.

2 Thus formerly it applied whether they were freehold or copyhold: see *Aldrich v Cooper* (1803) 8 Ves 382 at 388; *Tidd v Lister, Bassil v Lister* (1852) 10 Hare 140; on appeal (1853) 3 De GM & G 857 at 872.

3 Eg a portion secured by a charge (*Lord Rancliffe v Lord Parkyns* (1818) 6 Dow 149 at 214, HL) or a jointure (*Lanoy v Duke and Duchess of Athol* (1742) 2 Atk 444).

4 Eg a vendor's lien (see *Trimmer v Bayne* (1803) 9 Ves 209; *Sproule v Prior* (1836) 8 Sim 189), although the question in these cases could not arise after the Real Estate Charges Act 1854 (Locke King's Act), now replaced, so far as it would apply to deaths occurring after 31 December 1925, by the Administration of Estates Act 1925 s 35 (see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 414, 424). There must, however, be an actual lien; a mere claim to set-off will not suffice: *Webb v Smith* (1885) 30 ChD 192, CA.

5 *Barnes v Racster* (1842) 1 Y & C Ch Cas 401; *Bugden v Bignold* (1843) 2 Y & C Ch Cas 377; *Titely v Davies* (1743) 2 Y & C Ch Cas 399n; *Gibson v Seagrim* (1855) 20 Beav 614 at 619; *Trumper v Trumper* (1872) LR 14 Eq 295 (affd (1873) 8 Ch App 870); cf *Re Lawder's Estate* (1861) 11 I Ch R 346; *Re Rorke's Estate* (1865) 15 1 Ch R 316; *Flint v Howard* [1893] 2 Ch 54, CA; and see *Smyth v Toms* [1918] 1 IR 338, differing from *Re Archer's Estate* [1914] 1 IR 285 (marshalling of the first mortgagee's security in favour of the second mortgagee allowed).

6 *Re Mower's Trusts* (1869) LR 8 Eq 110; and see MORTGAGE vol 77 (2010) PARA 635.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(5) MARSHALLING/761. Marshalling of assets.

## **761. Marshalling of assets.**

The doctrine of marshalling is applied in the administration of estates, although the occasion for it has been diminished by statutory changes as to the recovery of debts. Formerly, certain classes of specialty debts were recoverable out of both the real and the personal estates of a deceased debtor, while simple contract debts were recoverable out of the personal estate only. As between creditors, accordingly, the simple contract creditors were entitled to have the assets marshalled in their favour so as to throw the specialty creditors on the real estate<sup>1</sup>. The distinction between specialty and simple contract creditors having been abolished, all are now entitled to be paid rateably<sup>2</sup>.

<sup>1</sup> *Aldrich v Cooper* (1803) 8 Ves 382 at 394; and see *Sagitary v Hyde* (1687) 1 Vern 455 and the reporter's notes.

<sup>2</sup> See PARA 461 ante. Under the Administration of Estates Act 1925 s 35 (replacing the Real Estate Charges Acts 1854, 1867 and 1877), debts forming a specific charge or lien on real or leasehold estate of a deceased person are, as between the different persons claiming under him, to be borne by that real or leasehold estate; and, where the creditor resorts to other property, the persons thus disappointed are entitled to be recouped out of the real or leasehold estate: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 424 et seq. As to apportionment where both real and personal estate are charged see *Lipscomb v Lipscomb* (1868) LR 7 Eq 501; and as between different real properties see *De Rochefort v Dawes* (1871) LR 12 Eq 540.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(5) MARSHALLING/762. Marshalling as between beneficiaries.

## 762. Marshalling as between beneficiaries.

Marshalling is also applied as between beneficiaries, so that, if a creditor, with his remedy against the real and personal estate, has been paid out of the personal estate, a pecuniary legatee is entitled to be paid out of the real estate<sup>1</sup>. This is, however, restricted to the real estate which has not been devised, but has been allowed to go as upon an intestacy; since, if the testator has devised his real estate, the devisee has a right preferable to that of the legatee<sup>2</sup>, unless the devised estate is charged with the payment of debts by the will, and then, if the debts are paid out of the personal estate, the legatee is entitled to have the devised estate marshalled<sup>3</sup>. Moreover, if the devised estate is subject to a mortgage which the testator has directed to be paid out of the personal estate, the pecuniary legatees are entitled, if the testator has excluded the statutory rule by which charges on property are to be paid primarily out of the property charged<sup>4</sup>, to stand in the shoes of the mortgagee against the devised estate to the extent to which such payment disappoints them<sup>5</sup>.

Where some legacies are charged on real and personal estate and other on personal estate only, the legatees whose legacies are charged on the personal estate only are entitled to have the real estate marshalled<sup>6</sup>.

1 'The mere bounty of the testator enables the legatee to call for this species of marshalling: that, if those creditors having the right to go to the real estate descended will go to the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid or not': *Aldrich v Cooper* (1803) 8 Ves 382 at 396; and see *Clifton v Burt* (1720) 1 P Wms 678, and the reporter's notes; *Tombs v Roch* (1846) 2 Coll 490; *Paterson v Scott* (1852) 1 De GM & G 531. As to the application of the doctrine where part of a specific legacy is applied in payment of the testator's debt see *Re Broadwood*, *Lyall v Broadwood* [1911] 1 Ch 277.

2 *Hanby v Roberts* (1751) Amb 127 at 129. The same applies where the devisee is heir: *Strickland v Strickland* (1839) 10 Sim 374.

3 *Rickard v Barrett* (1857) 3 K & J 289; *Foster v Cook* (1791) 3 Bro CC 347 at 351. A direction to pay debts sufficiently charges them on the real estate to give the pecuniary legatees a right to marshal: *Re Stokes*, *Parsons v Miller* (1892) 67 LT 223; *Re Salt*, *Brothwood v Keeling* [1895] 2 Ch 203; *Re Roberts*, *Roberts v Roberts* [1902] 2 Ch 834, overruling *Re Bate*, *Bate v Bate* (1890) 43 ChD 600. The Land Transfer Act 1897 did not interfere with marshalling (*Re Kempster*, *Kempster v Kempster* [1906] 1 Ch 446; cf *Re Balls*, *Trewby v Balls* [1909] 1 Ch 791); it was replaced by the Administration of Estates Act 1925 Pt I (ss 1-3) (as amended) and, where the estate is solvent, the order of application of the assets (specified in s 34(3), Sch 1 Pt II (as amended)): see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 416 et seq) makes property charged with the payment of debts applicable before the fund for pecuniary legacies so that the right of the legatees to marshal is preserved. See also *Re Littlewood*, *Clark v Littlewood* [1931] 1 Ch 443; *Re Meldrum*, *Swinson v Meldrum* [1952] Ch 208; sub nom *Re Meldrum's Will Trusts*, *Swinson v Meldrum* [1952] 1 All ER 274.

4 See the Administration of Estates Act 1925 s 35; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 424 et seq.

5 *Re Smith*, *Smith v Smith* [1899] 1 Ch 365. Prior to the Real Estate Charges Act 1854 (Locke King's Act) (repealed by the Administration of Estates Act 1925 s 56, Sch 2, and replaced for present purposes by s 35), the rule was established in equity by *Lutkins v Leigh* (1734) Cas temp Talb 53; *Johnson v Child* (1844) 4 Hare 87; and see *Porcher v Wilson* (1864) 10 LT 714; subsequent proceedings (1866) 14 WR 1011. The rule ceased to apply, however, where the statute applied. The rule, as Romer J pointed out in *Re Smith*, *Smith v Smith* [1899] 1 Ch 365 at 371, is difficult to justify on principle.

6 *Masters v Masters* (1718) 1 P Wms 421; *Bonner v Bonner* (1807) 13 Ves 379; *Scales v Collins* (1853) 9 Hare 656. If a widow's right to paraphernalia can be considered as now in existence (see *Masson, Templier & Co v De Fries* [1909] 2 KB 831, CA), the principle as regards legacies applies with yet stronger reason to such a claim, and she is accordingly entitled to have the assets marshalled in her favour: *Tipping v Tipping* (1721) 1 P

Wms 729 at 730; *Tynt v Tynt* (1729) 2 P Wms 542 at 544; *Inclendon v Northcote* (1746) 3 Atk 430 at 438; *Boynton v Parkhurst* (1784) 1 Bro CC 576; *Aldrich v Cooper* (1803) 8 Ves 382 at 397.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(5) MARSHALLING/763. Other cases of marshalling.

### 763. Other cases of marshalling.

The doctrine of marshalling is applied as regards the Crown's claims against the whole property of the debtor, where other creditors can take only part<sup>1</sup>; in bankruptcy<sup>2</sup>; and in admiralty<sup>3</sup>; and it is the foundation of the rights of a surety to the creditor's securities<sup>4</sup>. If co-owners holding property on trust for sale for themselves as tenants in common mortgage the property to secure an advance to one of them, the debt must primarily be discharged out of his share<sup>5</sup>.

1 *Aldrich v Cooper* (1803) 8 Ves 382 at 388; *Sagitary v Hyde* (1687) 1 Vern 455. The Crown is bound by the provisions of the Administration of Estates Act 1925 as respects the estates of persons dying after 31 December 1925: see s 57(1); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 399. As to the priority of certain Crown debts when the estate is insolvent see *A-G v Jackson* [1932] AC 365, HL; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 399; BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 577 et seq, 823 et seq.

2 *Re Stephenson, ex p Stephenson* (1847) De G 586 (proceeds of goods distrained marshalled in favour of mortgagee of a part only); *Re Holland, ex p Alston* (1868) 4 Ch App 168; *Re Stratton, ex p Salting* (1883) 25 ChD 148, CA.

3 *The Trident* (1839) 1 Wm Rob 29 at 35; *The Edward Oliver* (1867) LR 1 A & E 379; *The Eugénie* (1873) LR 4 A & E 123.

4 *Aldrich v Cooper* (1803) 8 Ves 382 at 389; *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 12, HL; and see *Knight v Lawrence* [1991] 1 EGLR 143; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1013 et seq.

5 *Re a Debtor (No 24 of 1971), ex p Marley v Trustee of the property of the Debtor* [1976] 2 All ER 1010, [1976] 1 WLR 952 (marshalling held to apply against the trustee in bankruptcy).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(6) MERGER OF ESTATES AND CHARGES/764. In equity merger depends on intention.

## **(6) MERGER OF ESTATES AND CHARGES**

### **764. In equity merger depends on intention.**

At law, when a lesser estate was vested in the same person as a greater estate without any intermediate estate, the lesser estate merged in the greater and was extinguished, without regard to the intention of the parties concerned<sup>1</sup>. Equity is not guided by the rules of law as to merger, and both as regards the merger of a lesser estate in a greater, and a merger of a charge in the land, the question depends upon the intention, actual or presumed, of the person in whom the interests become united<sup>2</sup>. A court of equity so regulates the parties' rights with reference to the doctrine of merger that it will not allow merger to take place if it sees equitable reasons for holding that it should not take place<sup>3</sup>. The equitable doctrine prevails by reason of the Law of Property Act 1925<sup>4</sup>, which provides that there is not to be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity<sup>5</sup>.

1 *Burton v Barclay* (1831) 7 Bing 745 at 756; and see *Doe d Rawlings v Walker* (1826) 5 B & C 111 at 121; *Re Searle, Ryder v Bond* [1912] 2 Ch 365 (merger in the case of a mentally disordered person); *Re Chance's Settlement Trusts, Chance v Billing* (1918) 62 Sol Jo 349 (intermediate executory interest preventing merger). There can be no merger where the greater estate is not sufficiently large to enable the lesser estate to merge in it, as where the greater estate is defeasible: *Re Bellville's Settlement Trusts, Westminster Bank Ltd v Bellville* [1964] Ch 163, [1963] 3 All ER 270; cf *Re Attkins, Life v Attkins* [1913] 2 Ch 619.

2 *Forbes v Moffatt* (1811) 18 Ves 384 at 390; *Symons v Southern Rly Co* (1935) 153 LT 98 at 101, CA.

3 *Brandon v Brandon* (1861) 31 LJ Ch 47 at 49.

4 See the Law of Property Act 1925 s 185 (which replaced the Supreme Court of Judicature Act 1873 s 25(4)); and REAL PROPERTY VOL 39(2) (Reissue) PARAS 255-256.

5 See *Snow v Boycott* [1892] 3 Ch 110; *Thellusson v Liddard* [1900] 2 Ch 635; *Capital and Counties Bank Ltd v Rhodes* [1903] 1 Ch 631, CA; *Re Fletcher, Reading v Fletcher* [1917] 1 Ch 339, CA.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(6) MERGER OF ESTATES AND CHARGES/765. Merger of estates.

## 765. Merger of estates.

A lesser estate is not merged in a greater<sup>1</sup> if there is an express or presumed intention that it is to be kept alive<sup>2</sup>. Where no intention is expressed, the intention may be presumed from the circumstances, as where the estates are held by the same person in different rights, for example one beneficially and the other as trustee<sup>3</sup>, or where it is for the advantage of the holder of the two estates that the lesser estate should be kept alive<sup>4</sup>.

1 In law a freehold estate is greater than a term of years, however long: see 3 Preston's Conveyancing 219. Where the reversion on a lease for 1,000 years had been granted for 500 years, it was held that, the reversion being the greater estate, the 1,000 years could be swallowed up in it if it should determine at any time during the term of 500 years by forfeiture or surrender: *Stephens v Bridges* (1821) 6 Madd 66. There was an exception in the case of an estate tail, and this was not merged in the fee simple: *Van Grutten v Foxwell* [1897] AC 658 at 679, HL; *Re Dunsany's Settlement*, *Nott v Dunsany* [1906] 1 Ch 578 at 582, CA. The question can now arise only with regard to the merger of a term of years in the fee, or of one term in another, as the only estates now capable of existing at law are the fee simple absolute in possession and the term of years absolute: see the Law of Property Act 1925 s 1(1); and REAL PROPERTY vol 39(2) (Reissue) PARA 45.

2 A mortgage may be kept on foot in accordance with the intention of the parties, if, under the form of conveyancing used, it would be merged: *Whiteley v Delaney* [1914] AC 132, HL. It seems that a tenancy from year to year cannot be kept on foot in perpetuity by a tenant who acquires the fee: *Westwood v Heywood* [1921] 2 Ch 130; and see *Golden Lion Hotel (Hunstanton) Ltd v Carter* [1965] 3 All ER 506, [1965] 1 WLR 1189 (express declaration of merger, even though probably made per incuriam, effective in favour of innocent third party).

3 *Lady Platt v Sleap* (1611) Cro Jac 275; *Nurse v Yerworth* (1674) 3 Swan 608 at 618; *Hopkins v Hopkins* (1738) 1 Atk 581 at 592; *Chambers v Kingham* (1878) 10 ChD 743; *Re Radcliffe*, *Radcliffe v Bewes* [1892] 1 Ch 227 at 231, CA.

4 *Ingle v Vaughan-Jenkins* [1900] 2 Ch 368. As regards merger a long term was treated as less than a freehold estate, such as (formerly) an estate for life: see *Capital and Counties Bank Ltd v Rhodes* [1903] 1 Ch 631, CA; and see note 1 supra.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(6) MERGER OF ESTATES AND CHARGES/766. Merger of charges.

### **766. Merger of charges.**

Where a person entitled to land acquires a charge upon it<sup>1</sup>, and at the same time expresses his intention that the charge shall not merge, this is sufficient to keep it alive<sup>2</sup>. It is not necessary to take a transfer of the charge to a trustee. This is useful only as evidence of an intention to avoid merger where no intention is expressed and there would otherwise be a presumption of merger<sup>3</sup>. If, however, there is an express or presumed intention in favour of merger, the charge will be extinguished notwithstanding that it is outstanding in a trustee<sup>4</sup>.

1 See generally MORTGAGE.

2 *Watts v Symes* (1851) 1 De GM & G 240; *Adams v Angell* (1876) 5 ChD 634, CA.

3 *Hood v Phillips* (1841) 3 Beav 513; and see *Bailey v Richardson* (1852) 9 Hare 734; and PARA 768 post.

4 *Astley v Milles* (1827) 1 Sim 298; *Pitt v Pitt* (1856) 22 Beav 294.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(6) MERGER OF ESTATES AND CHARGES/767. Presumptions in regard to merger.

### 767. Presumptions in regard to merger.

Where no intention is expressed, or the person is incapable of expressing any, the court considers what is most advantageous for him, and decides for or against merger accordingly<sup>1</sup>. On this are founded two presumptions.

The first presumption is in favour of merger when the ownership in fee simple of the land and the absolute ownership of the charge become vested in the same person, and there is no special reason for keeping the charge alive; for the title is simplified by the charge being extinguished, and its continued existence is useless to the owner<sup>2</sup>. It is the same where the owner in fee simple pays off the charge<sup>3</sup>. The presumption applies also to a tenant in tail<sup>4</sup>, unless he is forbidden by statute to bar the entail<sup>5</sup>, so that he cannot become owner in fee simple; but it does not apply where the fee is liable to be defeated by an executory devise<sup>6</sup>.

The second presumption is that there is no merger where the charge is acquired by a limited owner, or where a limited owner pays it off. It is not for his advantage that his charge should sink for the benefit of the remainderman<sup>7</sup>. Where an owner of a freehold estate borrowed money from the trustees of his marriage settlement on the security of the estate, he being beneficially entitled to the money subject to a life interest, there was no merger by reason of his testamentary dispositions as the life interest was still continuing at his death<sup>8</sup>.

1 *Forbes v Moffatt* (1811) 18 Ves 384; *Grice v Shaw* (1852) 10 Hare 76; *Tyrwhitt v Tyrwhitt* (1863) 32 Beav 244; *Thorne v Cann* [1895] AC 11 at 18, HL.

2 *Donisthorpe v Porter* (1762) 2 Eden 162; *Forbes v Moffatt* (1811) 18 Ves 384; *Grice v Shaw* (1852) 10 Hare 76; *Swinfen v Swinfen (No 3)* (1860) 29 Beav 199 at 203; and see *Re Toppin's Estate* [1915] 1 IR 330, CA.

3 *Earl of Buckinghamshire v Hobart* (1818) 3 Swan 186.

4 *Drinkwater v Combe* (1825) 2 Sim & St 340.

5 *Countess of Shrewsbury v Earl of Shrewsbury* (1790) 3 Bro CC 120.

6 *Drinkwater v Combe* (1825) 2 Sim & St 340.

7 *Burrell v Earl Egremont* (1844) 7 Beav 205 at 232; *Pitt v Pitt* (1856) 22 Beav 294. If a remainderman in tail whose estate is preceded by another estate tail pays off a charge, the presumption is originally against merger, and this continues even though his estate falls into possession: *Wigsell v Wigsell* (1825) 2 Sim & St 364 at 369; *Horton v Smith* (1858) 4 K & J 624 at 628. The presumption against merger applies with yet stronger reason when a tenant for life in remainder pays off a charge: *Re Chesters, Whittingham v Chesters* [1935] Ch 77. Similarly, where a tenant for life with ultimate remainder in fee simple, who has paid off a charge, becomes immediately entitled in fee simple by the failure of intermediate estates, the charge does not thereupon merge: *Wyndham v Earl Egremont* (1775) Amb 753; *Trevor v Trevor* (1833) 2 My & K 675. The presumption is not rebutted where a limited owner reduces charges by payments out of income, and the payments are a charge on the inheritance in his favour: *Williams v Williams-Wynn* (1915) 84 LJ Ch 801. Note that, subject to certain exceptions, it has not been possible to create a strict settlement under the Settled Land Act 1925 since the coming into force of the Trusts of Land and Appointment of Trustees Act 1996 on 1 January 1997: see REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS.

8 *Wilkes v Collin* (1869) LR 8 Eq 338.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(6) MERGER OF ESTATES AND CHARGES/768. Where the presumptions are excluded.

### **768. Where the presumptions are excluded.**

The presumptions as to merger<sup>1</sup> furnish only prima facie rules as to merger, and they yield to the intention, whether express or implied<sup>2</sup>. The actual intention may be inferred from acts done, either at the time of the union of the charge with the estate, or subsequently during the owner's life<sup>3</sup>. Taking a transfer of the charge in the name of a trustee is evidence against merger, but is not by itself conclusive<sup>4</sup>. Subsequent dispositions of the property, whether by will<sup>5</sup> or inter vivos, may show that the property was intended to pass free from the charge; and this will usually be the case if there is an alienation for value<sup>6</sup>. The presumptions have no place where the owner is incapable of having an intention. Hence, where the court paid off a charge on the estate of a tenant in tail who was a minor, there was no merger<sup>7</sup>.

Moreover, the first presumption does not apply in the case of an owner in fee simple who pays off a charge, if it is for his benefit that the charge should be kept alive, as is the case where there are subsequent charges which would be advanced by its extinction. An exception exists as regards a mortgagor, who cannot pay off a first mortgage and then set it up against a subsequent charge which he has himself created<sup>8</sup>. The exception was formerly extended to a purchaser of the equity of redemption, so as to prevent him from keeping alive an incumbrance which he had paid off against other incumbrances of which he had notice<sup>9</sup>, but this extension has been disapproved<sup>10</sup>. The purchaser can keep alive a prior incumbrance by expressing an intention to that effect; and, even if no intention is expressed, it will be sufficient if the circumstances indicate the intention<sup>11</sup>. It is probable that in the case of a purchaser of an equity of redemption the ordinary rule will now prevail; where it is for his advantage that a charge which he has paid off shall be kept alive, an intention to this effect will be presumed unless there are indications of a contrary intention<sup>12</sup>.

1 See PARA 767 ante.

2 *Grice v Shaw* (1852) 10 Hare 76 at 79.

3 *Hatch v Skelton* (1855) 20 Beav 453.

4 *Hood v Phillips* (1841) 3 Beav 513. A declaration by the owner that the charge is to be held in trust for himself, his executors, administrators and assigns will prevent merger: *Tyrwhitt v Tyrwhitt* (1863) 32 Beav 244. Merger will also be prevented where the owner in fee buys up a lease: *Gunter v Gunter* (1857) 23 Beav 571.

5 *Hood v Phillips* (1841) 3 Beav 513.

6 *Countess Dowager Gower v Earl Gower* (1783) 1 Cox Eq Cas 53 (marriage settlement); *Tyler v Lake* (1831) 4 Sim 351 (mortgage); *Bulkeley v Hope* (1855) 1 K & J 482; on appeal (1856) 8 De GM & G 36; *Re Fletcher, Reading v Fletcher* [1917] 1 Ch 339, CA. Cf *Neame v Moorsom* (1866) LR 3 Eq 91.

7 *Alsop v Bell* (1857) 24 Beav 451. This was so, apparently, as regarded a mentally disordered person, since the court does not interfere to alter the rights of the personal representatives: see *Ware v Polhill* (1805) 11 Ves 257 at 278. Where the charge and estate devolve, however, otherwise than by purchase, upon an owner in fee simple who is mentally disordered, there is a merger: *Lord Compton v Oxenden* (1793) 2 Ves 261.

8 *Otter v Lord Vaux* (1856) 6 De GM & G 638 at 642; *Parkash v Irani Finance Ltd* [1970] Ch 101 at 111-112, [1969] 1 All ER 930 at 936.

9 *Toulmin v Steere* (1817) 3 Mer 210 per Grant MR.

10 *Adams v Angell* (1876) 5 ChD 634, CA; and see *Watts v Symes* (1851) 1 De GM & G 240; *Stevens v Mid-Hants Rly Co*, *London Financial Association v Stevens* (1873) 8 Ch App 1064 at 1069, CA; *Thorne v Cann* [1895] AC 11, HL.

11 *Phillips v Gutteridge* (1859) 4 De G & J 531; *Adams v Angell* (1876) 5 ChD 634, CA; *Thorne v Cann* [1895] AC 11, HL. A stranger who pays off a mortgage is in general entitled to the benefit of it: *Butler v Rice* [1910] 2 Ch 277; *Ghana Commercial Bank v Chandiram* [1960] AC 732, [1960] 2 All ER 865, PC; *Castle Phillips Finance v Piddington* (1994) 70 P & CR 592, [1996] 1 FCR 269, CA; *Halifax Mortgage Services Ltd v Muirhead* (1997) 76 P & CR 418, [1997] NPC 171, CA.

12 *Thorne v Cann* [1895] AC 11, HL; *Liquidation Estates Purchase Co v Willoughby* [1898] AC 321, HL; and see the report of proceedings in the lower court [1896] 1 Ch 726 at 734, CA, per Lindley LJ; but *Toulmin v Steere* (1817) 3 Mer 210 does not seem to have been definitely overruled, and in *Whiteley v Delaney* [1914] AC 132, HL, Lord Haldane and Lord Dunedin expressly refrained from giving an opinion as to this. When the money secured by a mortgage has been discharged, a mortgage term becomes a satisfied term and merges in the reversion expectant on it, but this is without prejudice to the right of a tenant for life or other person having only a limited interest in the equity of redemption to require a mortgage to be kept alive by transfer or otherwise: see the Law of Property Act 1925 ss 5, 116; and REAL PROPERTY vol 39(2) (Reissue) PARA 113.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(6) MERGER OF ESTATES AND CHARGES/769. Conditions kept alive.

### **769. Conditions kept alive.**

Upon a similar principle equity will keep alive conditions which have become inoperative at law. Thus, where formerly land was devised to the testator's heir-at-law subject to a condition to pay a pecuniary legacy, the condition was at law useless to the legatee, since it was the heir himself who would take advantage of the condition broken; but payment of the legacy was enforced in equity and the heir, and a purchaser from him with notice, had to make it good<sup>1</sup>. It was the same where the devise on condition was to a stranger, and the heir on entering for breach of the condition was a trustee for the legatee<sup>2</sup>.

1 *Smith v Alterly* (1649) Freem Ch 136; and see *Earl of Winchelsea v Norcliffe* (1686) 1 Vern 435.

2 *Lord Mohun's Case* (undated) cited in *Cook v Fountain* (1676) 3 Swan 585 at 592; *Anon* (1704) Freem Ch 278.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(7) SUBROGATION/770. Doctrine of subrogation.

## (7) SUBROGATION

### 770. Doctrine of subrogation.

The expression 'subrogation' is a convenient way of describing a transfer of rights from one person to another, without assignment or assent of the person from whom the rights are transferred and which takes place by operation of law in a whole variety of widely different circumstances<sup>1</sup>. Subrogation is a remedy rather than a right<sup>2</sup>. There are conflicting theories<sup>3</sup> as to whether subrogation is an equitable doctrine or whether it rests on terms implied into the contract by operation of law. Some categories of subrogation seem to be clearly contractual in origin<sup>4</sup>, but others are in no way based on contract and appear to defy classification except as an empirical remedy to prevent a particular kind of unjust enrichment<sup>5</sup>. Whatever the basis, the rules may be modified by the express terms of the contract.

Subrogation arises not only in cases of suretyship<sup>6</sup>, but also in cases in which, without any contract of suretyship, there is a primary<sup>7</sup> and a secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom, as between the two, it ought to have been paid<sup>8</sup>. Subrogation arises in various factual situations. Thus where a third party has lent money to pay off a mortgage he has been held entitled to be subrogated to the mortgage which has been paid off<sup>9</sup>. The mere fact that one individual advances money to another to enable him to pay specific debts does not, however, in the absence of a special bargain, confer on the lender the rights of those whose debts are discharged<sup>10</sup>. When, however, A, acting as B's agent, pays out of his own pocket at B's request the price of land which B has contracted to buy from V, and V thereupon conveys the land to B, the law will subrogate to A the rights which V had over the land after the contract of sale and before completion<sup>11</sup>.

There is nothing illegitimate in invoking the two doctrines of tracing and subrogation<sup>12</sup> in the same case<sup>13</sup>.

1 *Orakpo v Manson Investments Ltd*[1978] AC 95 at 104, [1977] 3 All ER 1 at 7, HL, per Lord Diplock; *Re Peake's Abattoirs Ltd*[1986] BCLC 73; *Re TH Knitwear (Wholesale) Ltd*[1988] Ch 275, [1988] 1 All ER 860, CA. See also *Re Cleadon Trust Ltd*[1939] Ch 286, [1938] 4 All ER 518, CA; *Re Byfield (a bankrupt), ex p Hill Samuel & Co Ltd v Trustee of the property of the bankrupt*[1982] Ch 267, [1982] 1 All ER 249; *Re Tramway Building & Construction Co Ltd*[1988] Ch 293, [1988] 2 WLR 640; *Castle Phillips Finance v Piddington* (1994) 70 P & CR 592, [1996] 1 FCR 269, CA.

2 *Orakpo v Manson Investments Ltd*[1978] AC 95, [1977] 3 All ER 1, HL; *Re TH Knitwear (Wholesale) Ltd*[1988] Ch 275, [1988] 1 All ER 860, CA; *Boscawen v Bajwa, Abbey National plc v Boscawen*[1995] 4 All ER 769, [1996] 1 WLR 328, CA.

3 See the discussion in *Lord Napier and Ettrick v Hunter*[1993] AC 713, [1993] 1 All ER 385, HL; MacGillivray on Insurance Law (10th Edn, 2003) PARAS 22.13-22.23; Clarke *The Law of Insurance Contracts* (3rd Edn, 1999) PARA 31.2.

4 See eg *Nahhas v Pier House (Cheyne Walk) Management Ltd* (1984) 270 Estates Gazette 328 at 334 obiter per Denis Henry QC (basis of subrogation is contract to indemnify); *Hobbs v Marlowe*[1978] AC 16 at 38-39, [1977] 2 All ER 241 at 254-255, HL, per Lord Diplock; cf *Orakpo v Manson Investments Ltd*[1977] 1 All ER 666 at 676, [1977] 1 WLR 347 at 357, CA, per Buckley LJ and at 685 and at 368 per Goff LJ (subrogation an equitable doctrine which does not rest on contract) (affd [1978] AC 95, [1977] 3 All ER 1, HL); *Lord Napier and Ettrick v Hunter*[1993] AC 713, [1993] 1 All ER 385, HL.

5 *Banque Financière de la Cité v Parc (Battersea) Ltd*[1999] 1 AC 221, [1998] 1 All ER 737, HL; *Orakpo v Manson Investments Ltd*[1978] AC 95 at 104, [1977] 3 All ER 1 at 7, HL, per Lord Diplock; *Re TH Knitwear (Wholesale) Ltd*[1988] Ch 275, [1988] 1 All ER 860, CA; *England v Guardian Insurance Ltd*[1999] 2 All ER (Comm) 481.

6 See FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1138.

7 'Primary liability' means ultimate liability: *Re Downer Enterprises Ltd*[1974] 2 All ER 1074 at 1084, [1974] 1 WLR 1460 at 1470 per Pennycuik V-C (no reason why the principle should not apply in the circumstances of a company in liquidation).

8 *Duncan, Fox & Co v North and South Wales Bank*(1880) 6 App Cas 1 at 10-11, HL, per Lord Selborne LC; *Becton Dickinson UK Ltd v Zwebner*[1989] QB 208, [1989] 1 EGLR 71; and see *Allied London Investments Ltd v Hambro Life Assurance plc*[1985] 1 EGLR 45, CA. See also *Banque Financière de la Cité v Parc (Battersea) Ltd*[1999] 1 AC 221, [1998] 1 All ER 737, HL, distinguishing between subrogation to a security and subrogation merely to the indebtedness itself; *Halifax plc v Omar*[2002] EWCA Civ 121, [2002] 2 P & CR 377, [2002] All ER (D) 271 (Feb); and PARA 776 post.

9 *Chetwynd v Allen*[1899] 1 Ch 353; *Butler v Rice*[1910] 2 Ch 277; *Ghana Commercial Bank v Chandiram*[1960] AC 732, [1960] 2 All ER 865, PC; *Paul v Speirway Ltd (in liq)*[1976] Ch 220, [1976] 2 All ER 587 (no subrogation: the plaintiff was making an unsecured advance to the defendant and he obtained all he bargained for); *Boscawen v Bajwa, Abbey National plc v Boscawen*[1995] 4 All ER 769, [1996] 1 WLR 328; *Halifax Mortgage Services Ltd v Muirhead* (1997) 76 P & CR 418, [1997] NPC 171, CA; *Halifax plc v Omar*[2002] EWCA Civ 121, [2002] 2 P & CR 377, [2002] All ER (D) 271 (Feb).

10 See *Wylie v Carlyon*[1922] 1 Ch 51 at 63 per Eve J; *Barclays Bank Ltd v TOSG Trust Fund Ltd*[1984] AC 626, [1984] 1 All ER 628, CA; affd [1984] AC 626, [1984] 1 All ER 1060, HL. See also *Re Byfield (a bankrupt), ex p Hill Samuel & Co Ltd v Trustee of the property of the bankrupt*[1982] Ch 267, [1982] 1 All ER 249; *Care Shipping Corp v Latin American Shipping Corp, The Cebu*[1983] QB 1005, [1983] 1 All ER 1121 (doctrine of subrogation not applicable to claim by owners to exercise a lien on freights under a sub-sub-charter).

11 *Nottingham Permanent Benefit Building Society v Thurstan*[1903] AC 6, HL; *Orakpo v Manson Investments Ltd*[1978] AC 95, [1977] 3 All ER 1, HL, overruling *Congresbury Motors Ltd v Anglo-Belge Finance Co Ltd*[1971] Ch 81, [1970] 3 All ER 385, CA; *Paul v Speirway Ltd (in liq)*[1976] Ch 220, [1976] 2 All ER 587; *Boodle Hatfield & Co v British Films Ltd*[1986] FLR 134, applying *Orakpo v Manson Investments Ltd* supra and distinguishing *Paul v Speirway Ltd (in liq)* supra.

12 As to tracing see PARA 861 et seq post.

13 *Boscawen v Bajwa, Abbey National plc v Boscawen*[1995] 4 All ER 769, [1996] 1 WLR 328, CA.

## UPDATE

### 770 Doctrine of subrogation

NOTE 1--*Castle Phillips*, cited, applied in *UCB Group Ltd v Hedworth*[2003] EWCA Civ 1717, [2003] All ER (D) 71 (Dec).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(7) SUBROGATION/771. Subrogation at law in insurance cases.

## 771. Subrogation at law in insurance cases.

The doctrine of subrogation is applied at law in cases of insurance, where the insurance is a contract of indemnity only. Upon paying the insured his loss, the underwriter or insurer is entitled to the benefit of all remedies of the insured against persons liable for the loss, whether in contract or in tort<sup>1</sup>, and is entitled to sue in the name of the insured<sup>2</sup>, but he may not sue in his own name<sup>3</sup>. An insurer cannot exercise rights of subrogation against a co-assured under an insurance on property in which the co-assured has the benefit of cover which protects him against the very loss or damage to the insured property which forms the basis of the claim which the underwriters seek to preserve by way of subrogation<sup>4</sup>. Subrogation does not, however, have the effect of transferring to the insurer any cause of action which the insured may have had against the wrongdoer; and, if the insured has ceased to exist, a claim by the insurer will be struck out<sup>5</sup>. The right arises in equity and does not depend on the contract between the insurer and the insured<sup>6</sup>. The doctrine of subrogation confers on the insurer an equitable proprietary lien or charge on the moneys recovered by the insured person from a third party in respect of the insured loss. It has not been finally decided whether the equitable lien or charge attaches also to the rights of action vested in the insured person to recover from a third party<sup>7</sup>.

1 *Castellain v Preston* (1883) 11 QBD 380, CA; *Dufourcet v Bishop* (1886) 18 QBD 373; *Colonia Versicherung AG v Amoco Oil Co* [1997] 1 Lloyd's Rep 261, CA; *England v Guardian Insurance Ltd* [1999] 2 All ER (Comm) 481.

2 *Mason v Sainsbury* (1782) 3 Doug KB 61; *Simpson v Thomson* (1877) 3 App Cas 279, HL; *Lord Napier and Ettrick v Hunter* [1993] AC 713, [1993] 1 All ER 385, HL; *England v Guardian Insurance Ltd* [1999] 2 All ER (Comm) 481; *Graham v Entec Europe Ltd (t/a Exploration Associates)* [2003] EWCA Civ 1177, [2003] All ER (D) 43 (Aug). If, however, the terms of a lease preclude a landlord from securing damages in negligence from his tenant, the landlord's insurers will likewise be precluded: *Mark Rowlands Ltd v Berni Inns Ltd* [1986] QB 211, [1985] 3 All ER 473, CA. See further INSURANCE vol 25 (2003 Reissue) PARAS 195 et seq (non-marine insurance), 490 et seq (marine insurance).

3 *Simpson v Thomson* (1877) 3 App Cas 279, HL; *Castellain v Preston* (1883) 11 QBD 380, CA; *Esso Petroleum Co Ltd v Hall Russell & Co Ltd* [1989] AC 643, [1989] 1 All ER 37, HL; *England v Guardian Insurance Ltd* [1999] 2 All ER (Comm) 481; *Caledonia North Sea Ltd v Norton (No 2) Ltd (in liq)* [2002] UKHL 4 at [11], [2002] 1 All ER (Comm) 321, [2002] 1 Lloyd's Rep 553 per Lord Bingham of Cornhill (but note that there is a misprint in the report of this judgment). See also INSURANCE vol 25 (2003 Reissue) PARA 490 et seq; MacGillivray on Insurance Law (10th Edn, 2003) PARA 22.43.

4 *Petrofina (UK) Ltd v Magnaload Ltd* [1984] QB 127, [1983] 3 All ER 35; *The Yasin* [1979] 2 Lloyd's Rep 45; *Mark Rowlands Ltd v Berni Inns Ltd* [1986] QB 211, [1985] 3 All ER 473, CA; *Surrey Heath Borough Council v Lovell Construction Ltd* (1990) 24 ConLR 1, CA; *Stone Vickers Ltd v Appledore Ferguson Shipbuilders Ltd* [1991] 2 Lloyd's Rep 288; *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582; *Netherlands v Youell* [1997] 2 Lloyd's Rep 440 (affd [1998] 1 Lloyd's Rep 236, CA); *Co-operative Retail Services Ltd v Taylor Young Partnerships Ltd* [2000] 1 All ER (Comm) 721, 74 ConLR 12 (affd [2000] 2 All ER (Comm) 865, 74 ConLR 12, CA; [2002] UKHL 17, [2002] 1 All ER (Comm) 918, [2002] 1 WLR 1419); *Bovis Lend Lease Ltd v Saillard Fuller & Partners* (2001) 77 ConLR 134, [2001] All ER (D) 422 (Jul).

5 *MH Smith (Plant Hire) Ltd v DL Mainwaring (t/a Inshore)* [1986] 2 Lloyd's Rep 244, CA (insured company had been wound up and finally dissolved before action commenced).

6 *Randal v Cockran* (1748) 1 Ves Sen 98 per Lord Hardwicke LC ('the plainest equity that could be'); *Yates v Whyte* (1838) 4 Bing NC 272 at 283 per Tindal CJ; *Morris v Ford Motor Co Ltd* [1973] QB 792 at 800, [1973] 2 All ER 1084 at 1090, CA, per Lord Denning MR (not just and equitable to compel an employer company to allow its name to be used to sue the company's own employee); *Central Insurance Co Ltd v Seacalf Shipping Corpn, The*



*Aiolos* [1983] 2 Lloyd's Rep 25, CA; but see *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd* [1962] 2 QB 330 at 339-340, [1961] 2 All ER 487 at 490 per Diplock J; *Hobbs v Marlowe* [1978] AC 16 at 39, [1977] 2 All ER 241 at 255, HL, per Lord Diplock; *Orakpo v Manson Investments Ltd* [1978] AC 95 at 104, [1977] 3 All ER 1 at 7, HL, per Lord Diplock. See also *The Albazero, Owners of the cargo lately laden on board the ship or vessel Albacruz v Owners of the ship or vessel Albazero* [1977] AC 774 at 825, [1976] 3 All ER 129, HL.

7 *Lord Napier and Ettrick v Hunter* [1993] AC 713, [1993] 1 All ER 385, HL; *England v Guardian Insurance Ltd* [1999] 2 All ER (Comm) 481.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(7) SUBROGATION/772. Suretyship.

## **772. Suretyship.**

When a surety has paid a debt to a creditor, he is entitled in equity to be subrogated to all the rights possessed by the creditor<sup>1</sup>, and is entitled to have transferred to him any securities which the creditor has taken from the debtor, so as to help him recoup himself<sup>2</sup>.

<sup>1</sup> *Re Lord Churchill, Manisty v Churchill* (1888) 39 ChD 174; and see *Scholefield Goodman & Sons Ltd v Zyngier* [1986] AC 562, [1985] 3 All ER 105, PC; *Re Westdock Realisations Ltd* [1988] BCLC 354; *BSE Trading Ltd v Hands* (1996) 75 P & CR 138, [1996] EGCS 99, CA.

<sup>2</sup> *Mayhew v Crickett* (1818) 2 Swan 185; *Forbes v Jackson* (1882) 19 ChD 615. Where, however, the surety is reimbursed under a counter-guarantee, he loses his subrogation rights, which are transferred by operation of law to the counter-guarantor: *Brown Shipley & Co Ltd v Amalgamated Investment (Europe) BV* [1979] 1 Lloyd's Rep 488. See also *Castle Phillips Finance v Piddington* (1994) 70 P & CR 592, [1996] 1 FCR 269, CA.

As to a surety's right of subrogation see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1138; and as to his rights under the Mercantile Law Amendment Act 1856 s 5 see *Brown v Cork* [1985] BCLC 363, CA.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(7) SUBROGATION/773. Persons who provide money for necessities for minors.

### **773. Persons who provide money for necessities for minors.**

The basic principle of the common law is that a minor's contract is enforceable by, but not against, him. A minor is, however, obliged to pay for necessities supplied to him<sup>1</sup>. The equitable doctrine of subrogation applies where a person has advanced money to a minor for the purchase of necessities. The person who provided the necessities has a remedy against the minor; hence the person providing the money is subrogated to the rights of the supplier of the necessities and may maintain a claim for the money<sup>2</sup>.

1 See the Minors' Contracts Act 1987 ss 1(1)(a), 4(2) (repealing the Infants Relief Act 1874); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 12 et seq.

2 *Marlow v Pitfield* (1719) 1 P Wms 558; *Barclays Bank Ltd v TOSG Trust Fund Ltd* [1984] AC 626 at 639, [1984] 1 All ER 628 at 638, CA, obiter per Oliver LJ; affd [1984] AC 626, [1984] 1 All ER 1060, HL; and see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 21.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(7) SUBROGATION/774. Ultra vires borrowing.

## 774. Ultra vires borrowing.

At common law where a person had lent money to a company which had borrowed it in excess of its borrowing powers, no debt was created against the company, but, to the extent to which the money had been applied in discharging the claims of other creditors, the lender was said to be subrogated to their rights<sup>1</sup>; although the case has been stated alternatively by saying that, to the extent to which liabilities were reduced, the borrowing was not in substance in excess of the borrowing powers<sup>2</sup>. At any rate, the lender was not placed in the shoes of prior creditors who were paid with his money so as to acquire their priority for all purposes; thus, he did not rank before later creditors who had been partly paid with his money<sup>3</sup>, and he was not entitled to the benefit of any securities of the creditor paid off<sup>4</sup>.

However, the validity of an act done by a company may not now be called into question on the ground of lack of capacity by reason of anything in the company's memorandum<sup>5</sup>. Where necessary, the secondary remedies formerly available at common law still apply.

1 *Blackburn Building Society v Cunliffe Brooks & Co* (1882) 22 ChD 61, CA; affd sub nom *Cunliffe Brooks & Co v Blackburn and District Benefit Building Society* (1884) 9 App Cas 857, HL; *Barclays Bank Ltd v TOSG Trust Fund Ltd* [1984] AC 626 at 638-639, [1984] 1 All ER 628, CA, per Oliver LJ; affd [1984] AC 626, [1984] 1 All ER 1060, HL.

2 *Re Wrexham, Mold and Connah's Quay Rly Co* [1899] 1 Ch 440 at 446, CA, per Lindley MR; and see Ashburner's Principles of Equity (2nd Edn, 1933) p 244; cf the judgment in *Blackburn Building Society v Cunliffe Brooks & Co* (1882) 22 ChD 61 at 71, CA; on appeal sub nom *Cunliffe Brooks & Co v Blackburn and District Benefit Building Society* (1884) 9 App Cas 857, HL. On the same principle, where an agent borrows in excess of his authority, the lender can in equity recover the loan from the principal to the extent to which the money has in fact been applied in paying the principal's debts: *Bannatyne v MacIver* [1906] 1 KB 103, CA. As to the application of the principle in the case of a bank paying a customer's cheques in the absence of authorisation or ratification see *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48; *Re Cleadon Trust Ltd* [1939] Ch 286, [1938] 4 All ER 518; *Crantrave Ltd v Lloyds Bank plc* [2000] QB 917, [2000] 4 All ER 473, CA; and see *Wylie v Carlyon* [1922] 1 Ch 51 (club debentures; proceeds applied in paying off mortgage; no subrogation). See also *Deeny v Gooda Walker Ltd (in liq)* [1995] 4 All ER 289, [1995] 1 WLR 1206.

3 *Re Wrexham, Mold and Connah's Quay Rly Co* [1899] 1 Ch 440, CA.

4 *Bannatyne v MacIver* [1906] 1 KB 103 at 109, CA. See further COMPANIES.

5 Companies Act 1985 s 35(1) (ss 35(1), 35A substituted by the Companies Act 1989 s 108 (1)). As to the power of directors to bind a company see the Companies Act 1985 s 35A (as so substituted and as amended); and COMPANIES vol 14 (2009) PARA 263; and as to the invalidity of certain transactions involving directors etc see the Companies Act 1985 s 322A (added by the Companies Act 1989 s 109(1)); and COMPANIES vol 14 (2009) PARA 264.

The Companies Act 1985 ss 35(1), 35A (as so substituted and as amended) do not, however, apply to acts of a company which is a charity except in favour of a person who (1) gives full consideration in money or money's worth in relation to the act in question; and (2) does not know that the act is not permitted by the company's memorandum or, as the case may be, is beyond the powers of the directors, or who does not know at the time the act is done that the company is a charity: Charities Act 1993 s 65(1).

## UPDATE

## 774 Ultra vires borrowing

NOTE 5--Charities Act 1993 s 65 omitted: SI 2009/1941.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(7) SUBROGATION/775. Creditor of executor or trustee.

### **775. Creditor of executor or trustee.**

An executor or trustee who has incurred debts in carrying on the business of a testator or the administration of the trust estate is personally liable, but has a right of indemnity against the assets of the testator's estate, so far as they are authorised to be employed in the business<sup>1</sup>. The creditor, however, has no legal claim against the estate, but is subrogated to this right, while he retains also his legal claim against the executor<sup>2</sup> but, in asserting the right, he is subject to any defences which would avail against the executor<sup>3</sup>. The same principle applies in the case of a trustee and, it would seem, of a receiver, who has a right of indemnity against the trust estate, or property under his control, in respect of personal liability incurred to creditors<sup>4</sup>.

Trustees have an indemnity and a lien on the trust property where they have expended their own money in the preservation of the trust property, as by paying the premiums on an insurance policy. A third party who has at the request of the trustees advanced money for this purpose is subrogated to the right of the trustees<sup>5</sup>.

1 *Ex p Garland* (1804) 10 Ves 110.

2 *Re Johnson, Shearman v Robinson* (1880) 15 ChD 548; and see *Re Blundell, Blundell v Blundell* (1890) 44 ChD 1, CA.

3 *Re Johnson, Shearman v Robinson* (1880) 15 ChD 548.

4 *Re Johnson, Shearman v Robinson* (1880) 15 ChD 548; *Re Frith, Newton v Rolfe* (1902) 1 Ch 342; and see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 460.

5 *Re Leslie* (1883) 23 ChD 552; *Re Smiths's Estate* [1937] Ch 636; and see *Foskett v McKeown* [2001] 1 AC 102, [2000] 3 All ER 97, HL.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/4. EQUITABLE DOCTRINES AFFECTING PROPERTY/(7) SUBROGATION/776-800. Subrogation as a restitutionary remedy.

### **776-800. Subrogation as a restitutionary remedy.**

Where subrogation is sought as a remedy to prevent unjust enrichment the appropriate questions are, first, whether the defendant would be enriched at the claimant's expense; secondly, whether such enrichment would be unjust; and thirdly, whether there are nevertheless reasons of policy for denying a remedy<sup>1</sup>. Although there is no need to establish a common intention, questions of intention may be highly relevant to the question of whether or not enrichment has been unjust<sup>2</sup>.

The authorities were reviewed by the House of Lords in a 1998 case<sup>3</sup> where the claimant bank advanced money to the defendant to enable it to repay part of a loan from another bank secured by a first charge on its property. No security was taken but it was an express condition of the advance that other companies in the group to which the defendant belonged, including the O company, would not demand repayment of their loans to the defendant until the claimant had been repaid. The O company was not bound by the undertaking but it was held that in the absence of subrogation that company would be unjustly enriched at the claimant's expense; accordingly the claimant bank was entitled to be treated as against the O company as if it had the benefit of the first charge on the defendant's property.

1 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, [1998] 1 All ER 737, HL. In *Orakpo v Manson Investments Ltd* [1978] AC 95, [1977] 3 All ER 1, HL, the claim failed because it was considered that restitution would be contrary to the terms and policy of the Moneylenders Acts. See also *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 2)* [2003] EWHC 1032 (Comm), [2003] 2 All ER (Comm) 365; affd [2003] EWCA Civ 1446, [2003] All ER (D) 389 (Oct), (2003) Times, 30 October.

2 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, [1998] 1 All ER 737, HL. As to unjust enrichment see generally RESTITUTION; and see eg *Stephen Donald Architects Ltd v King* [2003] EWHC 1867 (TCC), [2003] All ER (D) 09 (Aug).

3 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, [1998] 1 All ER 737, HL.

### **UPDATE**

### **776-800 Subrogation as a restitutionary remedy**

NOTE 1--See also *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 2)* [2004] EWCA Civ 487, [2004] 2 Lloyd's Rep 319 (money which should have been paid to claimant erroneously paid to first defendant; first and second defendants found jointly and severally liable to claimant; full amount of judgment debt satisfied by second defendant; second defendant entitled to recover amount paid from first defendant); *Bee v Jenson* [2007] EWCA Civ 923, [2007] 4 All ER 791 (claimant's insurers, who provided hire car when claimant's car was being repaired, not under duty to give credit for introduction fee paid by hire company to them, when claiming for costs).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/5. EQUITABLE RELIEF AGAINST PENALTIES AND FORFEITURES/(1) PENALTIES/801. Relief against penalties.

## **5. EQUITABLE RELIEF AGAINST PENALTIES AND FORFEITURES**

### **(1) PENALTIES**

#### **801. Relief against penalties.**

Equity relieves against penalties when the intention of the penalty is to secure the payment of a sum of money or the attainment of some other object, and when the event upon which the penalty is made payable can be adequately compensated by payment of interest or otherwise<sup>1</sup>. Thus relief is granted in equity against the penalty in a money bond<sup>2</sup>, and also against penal sums made payable on breach of bonds, covenants and agreements for payment of money by instalments, such as hire purchase agreements<sup>3</sup>, or for doing or omitting to do a particular act<sup>4</sup>. The court will not, however, lightly interfere with freedom of contract and will not generally, merely because a person has made an improvident contract, relieve him from its consequences<sup>5</sup>. Furthermore, relief is granted only where compensation can be made for the breach<sup>6</sup>. By statute, similar relief was introduced into the practice of the common law courts<sup>7</sup>.

Before relief can be given, it has to be ascertained whether the specified sum<sup>8</sup> is in fact a penalty or liquidated damages<sup>9</sup>, that is whether at the time the contract was entered into, the predominant contractual function of the provision was to deter a party from breaking the contract or to compensate the innocent party for breach<sup>10</sup>. One circumstance where a presumption of penalty arises is where a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage<sup>11</sup>.

If it is a penalty, the court must refuse to enforce the penal part of the sum and must give judgment merely for the actual damages suffered by the claimant with, as appropriate, interest and costs, not exceeding the amount of the penalty<sup>12</sup>. The penalty clause is not, however, struck out. It remains in the contract and may be sued on, but it will not be enforced by the court beyond the sum which represents the actual loss of the party seeking payment<sup>13</sup>. The penalty may be the withholding from a person, or disentitling a person to, a sum of money which is due to him rather than requiring him to pay a sum of money<sup>14</sup>. The fact that a sum is made payable by way of penalty for breach of a negative covenant does not, however, in general deprive the covenantee of his right to an injunction<sup>15</sup>.

An exception to the general rule is the provision for the payment of a deposit by the purchaser on a contract for the sale of land, which even in the absence of an express contractual provision is an earnest for the performance of the contract. The exception is anomalous, but well established. In the event of completion the deposit, normally 10% of the purchase price, goes towards payment of the purchase price: in the event of the purchaser's failure to complete in accordance with the terms of the contract the deposit is forfeit, equity having no power to relieve against the forfeiture. However, whatever it may be called by the contract, if the deposit is not reasonable it will be regarded by the courts as a penalty. A party who seeks to obtain more than the customary 10% by way of forfeitable deposit must show special circumstances which justify such a deposit. In one case where the vendor failed to justify a 25% deposit the 'deposit' was held to be a penalty which must be repaid in full to the purchaser<sup>16</sup>.



1 'The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money, and the court gives him all that he expected or desired': *Peachy v Duke of Somerset* (1721) 1 Stra 447 at 453 per Lord Macclesfield LC; 2 White & Tud LC (9th Edn) 212; *Davis v Thomas* (1831) 1 Russ & M 506 at 507 per Leach MR. An agreement 'must not impose upon the breaker of a primary obligation a general secondary obligation to pay to the other party a sum of money that is manifestly intended to be in excess of the amount which would fully compensate the other party for the loss sustained by him in consequence of the breach of the primary obligation': *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 850, [1980] 1 All ER 556 at 567, HL, per Lord Diplock; and see *Jobson v Johnson* [1989] 1 All ER 621, [1989] 1 WLR 1026, CA. See also *Golden Bay Realty Pte Ltd v Orchard Twelve Investments Pte Ltd* [1991] 1 WLR 981, 135 Sol Jo LB 92, PC (a contract in a statutory form does not have all the incidents of an ordinary contract; in that case, since the provision for payment by the vendor of liquidated damages for delay in completion had been prescribed by the minister in accordance with his statutory powers, and the parties had been obliged to include it in their contract, the ordinary rule in relation to penalties was inapplicable); *Society of Lloyds v Twinn* [2000] All ER (D) 379, CA, applying *Jones v Society of Lloyds* [1999] All ER (D) 1454 (Lloyd's devised reconstruction and renewal settlement offer to provide financial assistance to Lloyd's names in meeting their accrued liabilities to Lloyd's; the settlement included a 'finality amount' which was a sum, less than the amount owed by the name, that was required to be paid in order to discharge their liability to Lloyd's and a clause in the agreement provided that if an accepting name failed to pay his finality payment then the settlement credits would be lost and he would, therefore, be required to pay the entirety of his liability: held this was the reverse of a penalty clause, it was a conditional benefit).

2 The relief goes beyond money bonds, and extends to all cases where the sum specified is in fact a penalty and secures some collateral object: *Sloman v Walter* (1783) 1 Bro CC 418 per Lord Thurlow LC; *Protector Endowment Loan and Annuity Co v Grice* (1880) 5 QBD 592, CA; *Law v Redditch Local Board* [1892] 1 QB 127 at 134, CA, per Kay LJ. Relief was given even where the violation of the bond was wilful: *Wilson v Barton* (1671) Nels 148.

3 *Cooden Engineering Co Ltd v Stanford* [1953] 1 QB 86, [1952] 2 All ER 915, CA; *Landom Trust Ltd v Hurrell* [1955] 1 All ER 839, [1955] 1 WLR 391; *Bridge v Campbell Discount Co Ltd* [1962] AC 600, [1962] 1 All ER 385, HL; *Financings Ltd v Baldock* [1963] 2 QB 104, [1963] 1 All ER 443, CA; *Export Credits Guarantee Department v Universal Oil Products Co Procon Inc and Procon (Great Britain) Ltd* [1983] 1 Lloyd's Rep 448, CA (clause in contract did not impose penalty; relief refused). Cf *Galbraith v Mitchenhall Estates Ltd* [1965] 2 QB 473, [1964] 2 All ER 653 (hiring agreement, where the hirer was not in a position to carry out the terms of the contract, but the owner had not been guilty of any fraud, sharp practice or unconscionable conduct at the time of entering into the contract; in those circumstances there was no equity to compel the owner to return an initial payment which the hirer had made). See also *Transag Haulage Ltd v Leyland DAF Finance plc* [1994] 2 BCLC 88, [1994] BCC 356 (the right to retake possession of goods subject to a hire-purchase agreement as opposed to the right to demand payment of a sum of money on an event such as the liquidation of the hirer does not constitute a penalty).

As to the supersession of hire and hire purchase agreements by consumer hire and consumer credit agreements see the Consumer Credit Act 1974 Pt II (ss 8-20) (as amended), Pt III (ss 21-41) (as amended); and CONSUMER CREDIT.

4 *Seton v Slade, Hunter v Seton* (1802) 7 Ves 265 at 273; *Forward v Duffield* (1747) 3 Atk 555 (relief against penalty in charterparty). See also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 126.

5 *Mussen v Van Diemen's Land Co* [1938] Ch 253, [1938] 1 All ER 210; *Stockloser v Johnson* [1954] 1 QB 476, [1954] 1 All ER 630, CA. 'I must dissent ... from the suggestion that there is a general principle of equity which justifies the court in relieving a party to any bargain if in the event it operates hardly against him': *Bridge v Campbell Discount Co Ltd* [1962] AC 600 at 614, [1962] 1 All ER 385 at 387, HL, per Viscount Simonds.

6 *Tall v Ryland* (1670) 1 Cas in Ch 183 at 184; *Withers v Kilrea* (1670) 1 Cas in Ch 189n.

7 As to money bonds see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 126. The statutory provisions relating to relief in respect of the enforcement of such bonds were enacted as a result of the practice that had become established in equity: see *Preston v Dania* (1872) LR 8 Exch 19 at 21 per Bramwell B.

8 It is not necessary for the penalty to be the payment of a sum of money. It may, for instance, be the transfer of shares for no consideration or at an undervalue: *Jobson v Johnson* [1989] 1 All ER 621, [1989] 1 WLR 1026, CA.

9 See *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, HL; *Cooden Engineering Co Ltd v Stanford* [1953] 1 QB 86, [1952] 2 All ER 915, CA; and DAMAGES vol 12(1) (Reissue) PARA 1066 et seq. In *Nutting v Baldwin* [1995] 2 All ER 321, [1995] 1 WLR 201, where there was a pooling of claims and contributions it was held not to be a penalty where under the terms of the scheme a defaulting member was deprived of his right to share in the benefit of the arrangement. In *Else (1982) Ltd v Parkland Holdings Ltd* [1994] 1 BCLC 130, CA, the provision was held not to be a penalty but a forfeiture.

10 See *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*[1915] AC 79, HL; *Lordsvale Financial plc v Bank of Zambia*[1996] QB 752, [1996] 3 All ER 156.

11 *Elphinstone (Lord) v Monkland Iron and Coal Co Ltd*(1886) 11 App Cas 332, HL; *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*[1915] AC 79, HL; *Lordsvale Finance plc v Bank of Zambia*[1996] QB 752, [1996] 3 All ER 156.

12 *Law v Redditch Local Board*[1892] 1 QB 127, CA; *Jobson v Johnson*[1989] 1 All ER 621, [1989] 1 WLR 1026, CA. Under the old procedure an action at law on a *quantum damnificatus* was directed to see how far the defendant had been damnified: see *Benson v Gibson* (1746) 3 Atk 395; *Hardy v Martin* (1783) 1 Bro CC 419n; *Sloman v Walter* (1783) 1 Bro CC 418; *Errington v Aynesly* (1788) 2 Bro CC 341.

13 *Jobson v Johnson*[1989] 1 All ER 621, [1989] 1 WLR 1026, CA.

14 *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd*[1974] AC 689, [1973] 3 All ER 195, HL; *Firma C-Trade SA v Newcastle Protection and Indemnity Association, The Fanti, Socony Mobil Oil Co Inc v West of England Ship Owners Mutual Insurance Association Ltd, The Padre Island (No 2)* [1989] 1 Lloyd's Rep 239, CA; on appeal [1991] 2 AC 1, [1990] 2 All ER 705, HL (where this point was not discussed).

15 *French v Macale* (1842) 2 Dr & War 269 at 274; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 129.

16 See *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd*[1993] AC 573, [1993] 2 All ER 370, PC, where the deposit was repayable with interest from the date of rescission, but with an allowance for the damage (if any) suffered by the vendor by reason of the defendant's failure to complete.

## UPDATE

### 801 Relief against penalties

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 9--See *Warnborough Ltd v Garmite Ltd*[2006] EWHC 10 (Ch), [2007] 1 P & CR 34 (option did not have features of a penalty clause).

NOTE 10--See also *Murray v Leisureplay plc*[2005] EWCA Civ 963, [2005] IRLR 946 (generous damages payable by employer for wrongful dismissal not unconscionable).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/5. EQUITABLE RELIEF AGAINST PENALTIES AND FORFEITURES/(1) PENALTIES/802. Non-payment of money.

## 802. Non-payment of money.

Where there is a stipulation that, on non-payment of a smaller sum, a larger sum is to be paid, the larger sum is a penalty and will be relieved against<sup>1</sup>, as where, upon non-payment of interest upon a mortgage debt at the stated times, interest at a higher rate is made payable retrospectively. Such interest is penal interest, and is not recoverable or chargeable in account between mortgagee and mortgagor<sup>2</sup>. It seems, however, that the court will not strike down as a penalty a term in an agreement which provides for a higher prospective increase in the rate of interest only in respect of default from the date of default or thereafter, where the increase is a modest one and not with the sole function of ensuring the borrower's compliance<sup>3</sup>. Any clause forfeiting an interest in property on non-payment of money is treated in equity as penal, and relief will be given on payment of the money with interest as compensation for the delay<sup>4</sup>. Upon this principle was founded the right of relief against a conveyance by way of mortgage after the conveyance had become absolute at law<sup>5</sup>; this right constituted the equity of redemption.

1 *Thompson v Hudson* (1869) LR 4 HL 1 at 15.

2 *Lady Holles v Wyse* (1693) 2 Vern 289; *Strode v Parker* (1694) 2 Vern 316; *Nicholls v Maynard, ex p Marquis of Powis* (1747) 3 Atk 519; *Bonafous v Rybot* (1763) 3 Burr 1370 at 1375; *Seton v Slade, Hunter v Seton* (1802) 7 Ves 265 at 273. However, a commission in addition to interest, payable on default in payment of instalments, is not a penalty: *General Credit and Discount Co v Glegg* (1883) 22 ChD 549.

3 *Lordsvale Finance plc v Bank of Zambia* [1996] QB 752, [1996] 3 All ER 156.

4 See *Re Dagenham (Thames) Dock Co, ex p Hulse* (1873) 8 Ch App 1022 (where, on non-payment of the balance of purchase money, the vendors were to resume possession of the property without any obligation to repay the part of the purchase-money already paid); *Kilmer v British Columbia Orchard Lands Ltd* [1913] AC 319, PC; *Steedman v Drinkle* [1916] 1 AC 275, PC; and see *Brickles v Snell* [1916] 2 AC 599, PC.

5 Perhaps this was first allowed when the non-payment on the appointed day was due to accident. In the first half of the seventeenth century the right of redemption had become fully established: Ashburner's *Principles of Equity* (2nd Edn, 1933) pp 35-36; and see Story, *Equity Jurisprudence* s 1014. When mortgages came to be recognised as merely securities for money, this reason for the allowance of the equity of redemption disappeared: see *Seton v Slade, Hunter v Seton* (1802) 7 Ves 265; *Casborne v Scarfe* (1738) 1 Atk 603; 2 White & Tud LC (9th Edn) 6. As to the relation of mortgagor and mortgagee see *Marquis of Cholmondeley v Lord Clinton* (1820) 2 Jac & W 1 at 182; Co Litt 205a, Butler's note (1); and MORTGAGE.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/5. EQUITABLE RELIEF AGAINST PENALTIES AND FORFEITURES/(1) PENALTIES/803. Provision for reducing amount payable.

### **803. Provision for reducing amount payable.**

Where money is actually payable, or to become payable, a provision may validly be made for diminishing the amount, or making it payable by instalments, or allowing other concessions to the debtor upon stipulated terms; and, if the debtor complies with the terms, he is entitled to the benefit of the provision<sup>1</sup>. He must purchase the benefit by strict compliance with the terms; and, if he is in default, the full debt is payable and he cannot claim relief as against a penalty<sup>2</sup>. Upon this principle, when one rate of interest has been stipulated for in a mortgage, interest at a lower rate may be substituted on condition of punctual payment<sup>3</sup>; and, where a debt is made payable by instalments, a stipulation that, on non-payment of any instalment, the entire debt is to become due is not in the nature of a penalty<sup>4</sup>.

1 *Thompson v Hudson* (1869) LR 4 HL 1 at 15.

2 Thus, where the creditor agrees to accept part of the debt in full satisfaction if paid within a stated time, equity will not relieve against the provision as to time: *Ford v Earl of Chesterfield* (1854) 19 Beav 428; *Sewell v Musson* (1683) 1 Vern 210; *Ex p Bennet* (1743) 2 Atk 527; *Re Neil, ex p Burden* (1881) 16 ChD 675, CA.

3 *Nicholls v Maynard, ex p Marquis of Powis* (1747) 3 Atk 519; *Stanhope v Manners* (1763) 2 Eden 197. 'Punctual payment' means payment on the day fixed for payment: *Leeds and Hanley Theatre of Varieties v Broadbent* [1898] 1 Ch 343, CA; *Maclaine v Gatty* [1921] 1 AC 376, HL; and see *Keene v Biscoe* (1878) 8 ChD 201; *Jobson v Johnson* [1989] 1 All ER 621, [1989] 1 WLR 1026, CA.

4 *Sterne v Beck* (1863) 1 De GJ & Sm 595; *Wallingford v Mutual Society* (1880) 5 App Cas 685, HL; *Protector Endowment Loan and Annuity Co v Grice* (1880) 5 QBD 592, CA.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/5. EQUITABLE RELIEF AGAINST PENALTIES AND FORFEITURES/(2) FORFEITURES/804. Relief against forfeiture for breach of covenant.

## **(2) FORFEITURES**

### **804. Relief against forfeiture for breach of covenant.**

From the earliest times courts of equity have asserted the right to relieve against the forfeiture of property. The jurisdiction has not been confined to any particular type of case<sup>1</sup>. The commonest instances concerned mortgages, giving rise to the equity of redemption<sup>2</sup>, and leases which commonly contain re-entry clauses<sup>3</sup>; but relief was also granted in the case of copyholds or where the forfeiture was in the nature of a penalty<sup>4</sup>. The right to relieve also applies where what is liable to forfeiture is not an interest in land but an interest in personal property<sup>5</sup>, whether proprietary or possessory<sup>6</sup>. Equity will not, however, interfere in cases of rescission of an ordinary contract of sale of land for failure to comply with an essential condition as to time<sup>7</sup>; and the courts have refused to extend the jurisdiction to ordinary commercial contracts unconnected with interests in land, and have left it very doubtful whether, outside the sphere of landlord and tenant, the jurisdiction could be exercised in a case where the forfeited interest depends on contract only and where relief would involve specifically performing the contract<sup>8</sup>. Thus there is no jurisdiction to grant relief in relation to a time charter<sup>9</sup>, or in relation to a contract granting licences to use certain names and trade marks<sup>10</sup>.

As regards two heads of jurisdiction, there has not been much difficulty in applying the principle<sup>11</sup>:

- 125 (1) where it is possible to state that the object of the transaction and of the insertion of the right to forfeit is essential to secure the payment of money, equity has been willing to relieve on terms that the payment is made with interest, if appropriate, and also costs<sup>12</sup>; thus, in the case of relief against forfeiture for non-payment of rent, it is an invariable condition of relief that the arrears, if not already available to the landlord, shall be paid within a time specified by the court<sup>13</sup>;
- 126 (2) the heads of fraud, accident, mistake and surprise have always been grounds for equitable intervention<sup>14</sup>, the inclusion of which entailed the exclusion of mere inadvertence and, with yet stronger reason, of wilful defaults<sup>15</sup>.

Outside these heads of jurisdiction there remained a debatable area in which were included obligations in leases such as to repair and analogous obligations concerning the condition of property, and covenants to insure or not to assign<sup>16</sup>.

While there is no general power in courts exercising equitable jurisdiction to relieve persons from their bargains<sup>17</sup>, or to let them buy their way out by uncovenanted payment, it is consistent with the above-mentioned principles for courts of equity, in the limited cases referred to and where it is appropriate, to relieve against forfeiture for breach of covenant or condition. Three conditions must be satisfied in a particular case for there to be jurisdiction to grant relief, namely, (a) the primary object of the bargain must be to secure a stated result; (b) that result must be one which can effectively be attained when the matter comes before the court; (c) it must be possible to say of the forfeiture provision that it was added by way of security for the production of that result<sup>18</sup>. The word 'appropriate' involves consideration of the conduct of the applicant for relief, in particular whether his default was wilful, of the gravity of

the breaches, and of the disparity between the value of the property of which forfeiture is claimed and the damage caused by the breach<sup>19</sup>. Save in exceptional cases, wilful breaches will not be relieved against<sup>20</sup>, nor will relief be granted where the breach involves the immoral user of demised premises<sup>21</sup>. The impossibility for the courts to supervise the execution of work is not a reason against granting relief; what the courts have to do is to satisfy themselves, after the event, that the covenanted work has been done, and they have ample machinery, through certificates or by inquiry, to do so<sup>22</sup>.

1 *Shiloh Spinners Ltd v Harding*[1973] AC 691 at 722, [1973] 1 All ER 90 at 100, HL, per Lord Wilberforce. It could be granted in relation to a hire purchase agreement for a car: *Goker v NWS Bank plc*(1990) Times, 23 May. As to the supersession of hire purchase agreements see PARA 801 note 3 ante. As to the meaning of forfeiture in a performance bond see *Cargill International SA v Bangladesh Sugar and Food Industries Corp*n[1998] 2 All ER 406, [1998] 1 WLR 461, CA.

2 See PARA 802 ante; and MORTGAGE vol 77 (2010) PARA 302 et seq.

3 See eg *Howard v Fanshawe*[1895] 2 Ch 581; *Dendy v Evans*[1910] 1 KB 263, CA. 'The court, in exercising its jurisdiction to grant relief in cases of non-payment of rent, is, of course, proceeding on the old principles of the court of equity, which always regarded the condition of re-entry as being merely security for payment of the rent and gave relief if the landlord could get his rent': *Chandless-Chandless v Nicholson*[1942] 2 KB 321 at 323, [1942] 2 All ER 315 at 317, CA, per Lord Greene MR. 'Save in exceptional circumstances, the function of the court in exercising this equitable jurisdiction is to grant relief when all that is due for rent and costs has been paid up': *Gill v Lewis*[1956] 2 QB 1 at 13, [1956] 1 All ER 844 at 852, CA, per Jenkins LJ; *Inntrepreneur Pub Co (CPC) v Langton*[2000] 1 EGLR 34, [2000] 08 EG 169; *Bland v Ingram's Estates Ltd (No 2)*[2001] EWCA Civ 1088, [2002] Ch 177, [2002] 1 All ER 244. It has been pointed out that to describe a proviso for re-entry as a security is merely a metaphor: it does not, eg, constitute security over a company's property within the meaning of the Insolvency Act 1986 s 10(1)(b) (prospectively replaced by s 8, Sch B1 (as substituted): *Re Lomax Leisure Ltd*[2000] Ch 502, [1999] 3 All ER 22. See also *Richard Clarke & Co Ltd v Widnall*[1976] 3 All ER 301, [1976] 1 WLR 845, CA; *Church Comrs for England v Nodjoumi* (1985) 51 P & CR 155; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 619 et seq.

4 *Shiloh Spinners Ltd v Harding*[1973] AC 691 at 722, [1973] 1 All ER 90 at 100, HL, per Lord Wilberforce; *Starside Properties Ltd v Mustapha*[1974] 2 All ER 567, [1974] 1 WLR 816, CA; *CVG Siderurgicia Del Orinoco SA v London Steamship Owners' Mutual Insurance Association Ltd, The Vainqueur José* [1979] 1 Lloyd's Rep 557; *Sport Internationaal Bussum BV v Inter-Footwear Ltd*[1984] 1 All ER 376, [1984] 1 WLR 776, CA (affd [1984] 2 All ER 321, [1984] 1 WLR 776, HL); *Firma C-Trade SA v Newcastle Protection & Indemnity Association (The Fanti)*, *Secony Mobil Oil Co Inc v West of England Ship Owners Mutual Insurance Association Ltd (The Padre Island) (No 2)* [1989] 1 Lloyd's Rep 239, CA (penalty clause and forfeiture provision distinguished); on appeal [1991] 2 AC 1, [1990] 2 All ER 705, HL (where this point was not discussed). As to relief against penalties see PARAS 801-803 ante.

5 *BICC plc v Burndy Corp*n[1985] Ch 232, [1985] 1 All ER 417, CA; *Barton Thompson & Co Ltd v Stapling Machines Co*[1966] Ch 499, [1966] 2 All ER 222; *Starside Properties Ltd v Mustapha*[1974] 2 All ER 567, [1974] 1 WLR 816, CA; *Sport Internationaal Bussum BV v Inter-Footwear Ltd*[1984] 1 All ER 376, [1984] 1 WLR 776, CA (affd [1984] 2 All ER 321, [1984] 1 WLR 776, HL); and see *Stockloser v Johnson*[1954] 1 QB 476 at 502-503, [1954] 1 All ER 630 at 644-645, CA, per Romer LJ and *Else (1982) Ltd v Parkland Holdings Ltd*[1994] 1 BCLC 130, CA, where relief was refused. See also *Transag Haulage Ltd v Leyland DAF Finance plc*[1994] 2 BCLC 88, [1994] BCC 356, where under a hire-purchase agreement the plaintiff's loss of its contingent right to buy the vehicles for £5 was a forfeiture of a proprietary right and accordingly the court had jurisdiction to relieve. It would not do so unless the terms upon which it was granted would confer on the owner at least as valuable rights as the owner would have enjoyed under the original agreement and failure to grant relief would confer a substantial windfall on the owner over and above what the original agreement provided for the owner to receive. Note the observations made on this decision in *On Demand Information plc (in administrative receivership) v Michael Gerson (Finance) plc*[1999] 2 All ER 811 at 825-826, [2000] BCC 289 at 302-303 and on appeal, when the first instance decision was affirmed, [2000] 4 All ER 734 at 748-750, [2001] 1 WLR 155 at 169-172, CA, per Robert Walker LJ (the point was not discussed on further appeal [2002] UKHL 13, [2003] 1 AC 268, [2002] 2 All ER 949). See also *Alf Vaughan & Co Ltd (in administrative receivership) v Royscot Trust plc*[1999] 1 All ER (Comm) 856.

6 *BICC plc v Burndy Corp*n[1985] Ch 232, [1985] 1 All ER 417, CA; *On Demand Information plc (in administrative receivership) v Michael Gerson (Finance) plc*[2000] 4 All ER 734, [2001] 1 WLR 155, CA (revsd in part [2002] UKHL 13, [2003] 1 AC 368, [2002] 2 All ER 949).

7 *Union Eagle Ltd v Golden Achievement Ltd*[1997] AC 514, [1997] 2 All ER 215, PC (purchaser tendered purchase money 10 minutes after appointed time).

8 *Sport Internationaal Bussum BV v Inter-Footwear Ltd*[1984] 1 All ER 376, [1984] 1 WLR 776, CA; affd [1984] 2 All ER 321, [1984] 1 WLR 776, HL; *Crittall Windows Ltd v Stormseal (UPVC) Window Systems Ltd*[1991] RPC 265.

9 *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade*[1983] QB 529, [1983] 1 All ER 301, CA (affd [1983] 2 AC 694, [1983] 2 All ER 763, HL); *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia, The Laconia*[1977] AC 850, [1977] 1 All ER 545, HL; *China National Foreign Trade Transportation Corp v Evlogia Shipping Co SA of Panama, The Mihalias Xilas*[1979] 2 All ER 1044, [1979] 1 WLR 1018, HL; *A/S Awilco v Fulvia SpA di Navigazione, The Chikuma*[1981] 1 All ER 652, [1981] 1 WLR 314, HL; and see *Italmare Shipping Co v Ocean Tanker Co Inc, The Rio Sun*[1982] 1 All ER 517 at 521, [1982] 1 WLR 158 at 163, CA, per Lord Denning MR.

10 *Sport Internationaal Bussum BV v Inter-Footwear Ltd*[1984] 1 All ER 376, [1984] 1 WLR 776, CA (affd [1984] 2 All ER 321, [1984] 1 WLR 776, HL); *Crittall Windows Ltd v Stormseal (UPVC) Window Systems Ltd*[1991] RPC 265; *Northern & Shell plc v Condé Nast and National Magazines Distributors Ltd*[1995] RPC 117.

11 See *Shiloh Spinners Ltd v Harding*[1973] AC 691 at 722, [1973] 1 All ER 90 at 100, HL, per Lord Wilberforce.

12 *Peachy v Duke of Somerset* (1721) 1 Stra 447; *Howard v Fanshawe*[1895] 2 Ch 581 at 588; *Shiloh Spinners Ltd v Harding*[1973] AC 691 at 722, [1973] 1 All ER 90 at 100, HL, per Lord Wilberforce; *Ladup Ltd v Williams & Glyn's Bank plc*[1985] 2 All ER 577, [1985] 1 WLR 851; *Re Brompton Securities Ltd (No 2)*[1988] 3 All ER 677. Relief was granted whether the lease was determined under a power of re-entry or under a provision that it should be void: *Bowser v Colby* (1841) 1 Hare 109. Where a lease has been forfeited for non-payment of rent and the tenant has not sought relief against forfeiture, an equitable chargee of the lease, though he cannot make a claim for direct relief, can claim indirect relief, in the shoes of the tenant, under the inherent jurisdiction of the High Court: *Bland v Ingram's Estates Ltd*[2001] Ch 767, [2002] 1 All ER 221, CA.

13 *Barton, Thompson & Co Ltd v Stapling Machines Ltd*[1966] Ch 499 at 510, [1966] 2 All ER 222 at 225 (where it was left undecided whether relief could be given against forfeiture in the case of a lease of a chattel); *Howard v Central Board of Finance of the Church of England* (1976) 244 Estates Gazette 51; *Bland v Ingram's Estates Ltd (No 2)* [2001] EWCA Civ 1088, [2002] Ch 177, [2002] 1 All ER 244 (where a lease has been forfeited for non-payment of rent by exercise of a right of re-entry, the benefits obtained by the lessor as a consequence of the re-entry must be taken into account when determining the sum to be paid by the lessee as the price of obtaining relief against forfeiture).

14 *Hill v Barclay* (1811) 18 Ves 56 at 62; *Gregory v Wilson* (1852) 9 Hare 683 at 689; and see *Eaton v Lyon* (1798) 3 Ves 690 at 693; *Bamford v Creasy* (1862) 3 Giff 675; *Bargent v Thompson* (1864) 4 Giff 473; *Upjohn v Macfarlane*[1922] 2 Ch 256, CA. Negligence was not a case for relief: *Barrow v Issacs & Son*[1891] 1 QB 417, CA. See also *Rose v Hyman*[1911] 2 KB 234 at 246, CA; on appeal sub nom *Hyman v Rose*[1912] AC 623, HL.

15 *Shiloh Spinners Ltd v Harding*[1973] AC 691 at 722, [1973] 1 All ER 90 at 100, HL, per Lord Wilberforce.

16 *Shiloh Spinners Ltd v Harding*[1973] AC 691 at 722, [1973] 1 All ER 90 at 100, HL, per Lord Wilberforce; and see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 628.

17 Cases where the court relieves against conditions contained in gifts inter vivos or wills raise considerations of a different kind from those relevant to contractual stipulations: *Shiloh Spinners Ltd v Harding*[1973] AC 691 at 723, [1973] 1 All ER 90 at 101, HL, per Lord Wilberforce. See GIFTS vol 52 (2009) PARA 251 et seq; WILLS vol 50 (2005 Reissue) PARA 419 et seq.

18 *Shiloh Spinners Ltd v Harding*[1973] AC 691 at 723, [1973] 1 All ER 90 at 101, HL, per Lord Wilberforce, explaining *Hill v Barclay* (1811) 18 Ves 56; *Southern Depot Co Ltd v British Railways Board*[1990] 2 EGLR 39; *On Demand Information plc (in administrative receivership) v Michael Gerson (Finance) plc*[2000] 4 All ER 734, [2001] 1 WLR 155, CA (revsd in part [2002] UKHL 13, [2003] 1 AC 368, [2002] 2 All ER 949). The wider view of Lord Simon of Glaisdale in *Shiloh Spinners Ltd v Harding* supra at 726-727 and at 103-104 and in *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia, The Laconia*[1977] AC 850 at 873-874, [1977] 1 All ER 545 at 553, HL, can no longer be relied upon since *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade*[1983] 2 AC 694, [1983] 2 All ER 763, HL: *Sport International Bussum BV v Inter-Footwear Ltd*[1984] 1 All ER 376, [1984] 1 WLR 776, CA (affd [1984] 2 All ER 321, [1984] 1 WLR 776, HL); likewise the view of Lloyd J in *Afovos Shipping Co SA v R Pagnan and F Lli, The Afovos* [1980] 2 Lloyd's Rep 469, decided on different grounds as reported in [1983] 1 WLR 195.

19 *Shiloh Spinners Ltd v Harding*[1973] AC 691 at 723-724, [1973] 1 All ER 90 at 101, HL, per Lord Wilberforce; *St Marylebone Property Co Ltd v Tesco Stores Ltd*[1988] 2 EGLR 40; *Crown Estate Commissioners v Signet Group plc*[1996] 2 EGLR 200.

20 *Shiloh Spinners Ltd v Harding*[1973] AC 691 at 725, [1973] 1 All ER 90 at 103, HL, per Lord Wilberforce (relief refused); *Tulapam Properties Ltd v De Almeida* (1981) 260 Estates Gazette 919; *Cremin v Barjack Properties Ltd* (1985) 273 Estates Gazette 299, CA; *St Marylebone Property Co Ltd v Tesco Stores Ltd*[1988] 2 EGLR 40.

21 See *GMS Syndicate Ltd v Gary Elliott Ltd*[1982] Ch 1, [1981] 1 All ER 619; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 622.

22 *Shiloh Spinners Ltd v Harding*[1973] AC 691 at 724, [1973] 1 All ER 90 at 102, HL, per Lord Wilberforce.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/5. EQUITABLE RELIEF AGAINST PENALTIES AND FORFEITURES/(2) FORFEITURES/805. Time within which relief will be granted.

### **805. Time within which relief will be granted.**

In equity there was no express limitation of time within which relief against forfeiture would be granted; if a lease had been determined by re-entry, the landlord was ordered to grant a new lease<sup>1</sup>, but by statute relief was limited to six months after possession recovered in ejectment, and the necessity for a new lease was dispensed with<sup>2</sup>. Ultimately jurisdiction to grant relief in the case of non-payment of rent was conferred on the courts of common law<sup>3</sup>; and jurisdiction to grant relief in this and other cases of forfeiture, with certain exceptions, is now vested in the High Court and county courts<sup>4</sup>.

If the court order granting relief fixes a time limit for performance of the conditions, the court has power to extend the time limit<sup>5</sup>; and, if it later appears that relief granted by way of an extension of time ought to be extended and that this can in fairness to the other party be done, the court has jurisdiction to grant a further extension<sup>6</sup>.

Where rent is not six months in arrear, so that the statutory jurisdiction<sup>7</sup> does not apply, equitable relief against forfeiture may still be granted<sup>8</sup>. Under the ancient jurisdiction of the former Court of Chancery relief against forfeiture for non-payment of rent may be granted to a tenant independently of statute where the landlord has recovered possession by peaceable re-entry<sup>9</sup>. The existence of statutory machinery for the granting of relief against forfeiture of leases does not affect any corresponding equitable jurisdiction outside the cases of leases<sup>10</sup>; but the inherent jurisdiction is displaced where the ground is covered by a detailed statutory scheme for relief which expressly provides that in particular circumstances previously within the inherent jurisdiction relief shall not be granted<sup>11</sup>.

The court's jurisdiction to grant relief against forfeiture lies when the provision for forfeiture is penal in character<sup>12</sup>; and, in relation to the jurisdiction of the court to vary an order granting an extension of time by granting a further extension, no distinction need be drawn between cases of relief for non-payment of rent and other cases where relief against forfeiture is sought<sup>13</sup>.

1 *Bowser v Colby* (1841) 1 Hare 109 at 130; and see *Dendy v Evans* [1910] 1 KB 263, CA.

2 The necessity was dispensed with first by the Landlord and Tenant Act 1730 ss 2-4 (repealed) (see *Bowser v Colby* (1841) 1 Hare 109 at 125); then by the Common Law Procedure Act 1852 ss 210-212 (as amended). Section 212 (relief against forfeiture on tenant's paying all rent and costs: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 628) applies even if the landlord has recovered possession out of court, and not under a judgment: *Howard v Fanshawe* [1895] 2 Ch 581; and see *Dendy v Evans* [1910] 1 KB 263, CA.

3 Repealed by the Common Law Procedure Act 1860 s 1 (repealed: see now the Supreme Court Act 1981 s 38); and see *Hare v Elms* [1893] 1 QB 604, DC.

4 As to relief against forfeiture see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 619 et seq.

5 *Chandless-Chandless v Nicholson* [1942] 2 KB 321, [1942] 2 All ER 315, CA; *City of Westminster Assurance Co Ltd v Ainis* (1975) 29 P & CR 469, CA (where order for relief against forfeiture is conditional on terms to be complied with in the future, the tenants, if in possession, are in the meanwhile tenants at will or on sufferance).

6 *Starside Properties Ltd v Mustapha* [1974] 2 All ER 567, [1974] 1 WLR 816, CA; and see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 628.

7 Repealed by the Common Law Procedure Act 1852 s 212: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 628.

8 *Standard Pattern Co Ltd v Ivey* [1962] Ch 432, [1962] 1 All ER 452 (the court's jurisdiction to relieve against forfeiture must be exercised in such a case according to the principle stated in the Supreme Court of Judicature (Consolidation) Act 1925 s 46 (repealed: see now the Supreme Court Act 1981 s 38)).

9 *Lovelock v Margo* [1963] 2 QB 786, [1963] 2 All ER 13, CA. Relief may be granted even where the claimant tenant is out of time having regard to the provisions of the Common Law Procedure Act 1852: *Thatcher v CH Pearce & Son (Contractors) Ltd* [1968] 1 WLR 748. As to the former Court of Chancery see PARAS 401-403 ante.

10 *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 724-725, [1973] 1 All ER 90 at 102, HL, per Lord Wilberforce; *Smith v Metropolitan City Properties Ltd* [1986] 1 EGLR 52.

11 *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 725, [1973] 1 All ER 90 at 102, HL, per Lord Wilberforce; *Official Custodian for Charities v Parway Estates Development Ltd (in liq)* [1985] Ch 151, [1984] 3 All ER 679, CA; *Smith v Metropolitan City Properties Ltd* [1986] 1 EGLR 52 at 53 per Walton J; *Harrison v Tew* [1989] QB 307, [1987] 3 All ER 865, CA; *Billson v Residential Apartments Ltd* (1990) 60 P & CR 392; affd [1991] 3 All ER 265, [1991] 3 WLR 264, CA; revsd on other grounds [1992] 1 All ER 141, [1992] 2 WLR 15, HL. In the light of these cases the decision in *Abbey National Building Society v Maybeech Ltd* [1985] Ch 190, [1984] 3 All ER 262 (decided on the same day as *Official Custodian for Charities v Parway Estates Developments Ltd (in liq)* supra) cannot be relied on.

12 See PARAS 801, 804 the text and note 4 ante.

13 *Starside Properties Ltd v Mustapha* [1974] 2 All ER 567 at 574, [1974] 1 WLR 816 at 824, CA, per Edmund Davies LJ.

## UPDATE

### 805 Time within which relief will be granted

NOTES 3, 8--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force on 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/5. EQUITABLE RELIEF AGAINST PENALTIES AND FORFEITURES/(2) FORFEITURES/806. Conditions must generally be observed strictly.

### **806. Conditions must generally be observed strictly.**

Where, under a contract, conveyance or will, a beneficial right is to arise upon the performance by the beneficiary of some act in a stated manner or at a stated time, the act must be performed accordingly in order to obtain the enjoyment of the right; and, in the absence of fraud, accident or surprise, equity will not relieve against a breach of the terms<sup>1</sup>. In the case of a will where there is a gift subject to a condition to be performed within a certain time or the grant of an option to be exercised within a certain time, there is no rule that the gift or option will lapse if the condition is not fulfilled or the option is not exercised within the specified time. It is, of course, a question of the construction of the particular will, but, if there is no gift over, and no prejudice, the court is unlikely to find that the testator intended the gift or the grant of the option to fail on the basis that time was of the essence. The time limits are likely to be construed as directory only<sup>2</sup>. In the case of a condition contained in a will, however, ignorance of the condition has been held to be no ground for relief<sup>3</sup>.

1 *Barrell v Sabine* (1684) 1 Vern 268; *Joy v Birch* (1836) 4 Cl & Fin 57, HL (sale with right of repurchase); *Ensworth v Griffiths* (1706) 5 Bro Parl Cas 184; *Davis v Thomas* (1831) 1 Russ & M 506 (release of equity of redemption with right of repurchase); *Greville v Parker* [1910] AC 335, PC (option to renew lease); *Burch v Farrows Bank Ltd* [1917] 1 Ch 606; *Simons v Associated Furnishers Ltd* [1931] 1 Ch 379 (option to determine lease); *Hare v Nicoll* [1966] 2 QB 130, [1966] 1 All ER 285, CA (option to repurchase shares); *West Country Cleaners (Falmouth) Ltd v Saly* [1966] 3 All ER 210, [1966] 1 WLR 1485, CA (option to renew lease). The court cannot vary the terms on which a right of pre-emption is given by will (*Brooke v Garrod* (1857) 2 De G & J 62), or on which a debt is remitted (*Glover v Portington* (1664) Freem Ch 182), or any other privilege conferred (*Franco v Alvares* (1746) 3 Atk 342 at 345), so as to allow any relaxation.

2 *Re Bowles, Hayward v Jackson* [2003] EWHC 253 (Ch), [2003] 2 All ER 387, [2003] 2 WLR 1274, applying *Taylor v Popham* (1782) 1 Bro CC 168 and *Re Packard, Packard v Waters* [1920] 1 Ch 596, distinguishing *Brooke v Garrod* (1857) 3 K & J 608, *Powell v Rawle* (1874) LR 18 Eq 243 and *Re Goldsmith's Will Trusts, Brett v Bingham* [1947] Ch 339, [1947] 1 All ER 451; not following *Re Averd, Hook v Parker* [1948] Ch 43, [1947] 2 All ER 548.

3 *Re Hodges' Legacy* (1873) LR 16 Eq 92; *Astley v Earl of Essex* (1874) LR 18 Eq 290; and see *Lady Anne Fry's Case* (1674) 1 Vent 199. As to conditions attached by a testator to his will see WILLS vol 50 (2005 Reissue) PARA 419 et seq.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/5. EQUITABLE RELIEF AGAINST PENALTIES AND FORFEITURES/(2) FORFEITURES/807. Relief in equity against conditions.

## 807. Relief in equity against conditions.

A court with equitable jurisdiction<sup>1</sup> may grant a donee relief against a condition precedent<sup>2</sup>, or against forfeiture under a condition subsequent, for example where performance has been prevented by the contrivance of the executors<sup>3</sup> or other persons interested<sup>4</sup>, and by no fault of the donee<sup>5</sup>, or where the condition is in the nature of a penalty<sup>6</sup>; and also in the case of conditions relating to matters such as the payment of legacies or other sums<sup>7</sup>, or the release of claims<sup>8</sup>, where the act has not been performed within the time required by the testator but is capable of being adequately performed at any time, on compensation being made, by the payment of interest or otherwise, for the delay. The court does not, however, give relief even in such cases where there is a gift over<sup>9</sup> to any person other than the one who would take by operation of law<sup>10</sup>; and outside such cases the court cannot give relief at all<sup>11</sup>.

1 The jurisdiction of a court of law to hold a condition substantially performed was not so wide as the equitable jurisdiction to give relief against non-performance: *Clarke v Parker* (1812) 19 Ves 1 at 21-22.

2 *Wallis v Crimes* (1667) 1 Cas in Ch 89; *Woodman v Blake* (1691) 2 Vern 222; *Hayward v Angell* (1683) 1 Vern 222; *Viscount Falkland v Bertie* (1698) 2 Vern 333 at 339.

3 *Brooke v Garrod* (1857) 2 De G & J 62.

4 Eg persons interested under the gift over (*Viscount Falkland v Bertie* (1698) 2 Vern 333 at 343; and see *D'Aguilar v Drinkwater* (1813) 2 Ves & B 225), or under a prior gift (*Hayes v Hayes* (1674) Cas temp Finch 231).

5 *Clarke v Parker* (1812) 19 Ves 1 at 17 per Lord Eldon LC.

6 *Wallis v Crimes* (1667) 1 Cas in Ch 89; *Priestley v Holgate* (1857) 3 K & J 286 at 288.

7 *Paine v Hyde* (1841) 4 Beav 468. Where the heir had entered on breach of condition by the devisee, the court gave relief to the devisee on payment of the legacy: *Underwood v Swain* (1649) 1 Rep Ch 161; *Barnardiston v Fane* (1699) 2 Vern 366; *Grimston v Lord Bruce* (1707) 1 Salk 156.

8 *Hayward v Angell* (1683) 1 Vern 222; *Taylor v Popham* (1782) 1 Bro CC 168; *Simpson v Vickers* (1807) 14 Ves 341; *Hollinrake v Lister* (1826) 1 Russ 500 at 508.

9 For these purposes, it appears that a mere clause of revocation does not amount to a gift over: *Simpson v Vickers* (1807) 14 Ves 341.

10 *Simpson v Vickers* (1807) 14 Ves 341 at 346; *Cage v Russel* (1681) 2 Vent 352; and see CHARITIES vol 8 (2010) PARA 138.

11 Eg against forfeiture under a condition as to marriage with consent: *Ashton v Ashton* (1703) Prec Ch 226; *Dashwood v Lord Bulkeley* (1804) 10 Ves 230 at 239; *Clarke v Parker* (1812) 19 Ves 1.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/5. EQUITABLE RELIEF AGAINST PENALTIES AND FORFEITURES/(2) FORFEITURES/808-850. Time not of the essence of the contract.

### **808-850. Time not of the essence of the contract.**

Analogous to relief against forfeiture is the rule of equity that time is not of the essence of a contract unless the parties have either expressly so stipulated<sup>1</sup> or the nature of the contract requires it<sup>2</sup>. If, however, one party to a contract for the sale of land fails either to complete or to perform some other obligation under the contract by the date fixed by the contract, the other party is entitled then and there to give notice requiring completion within a specified time; and, if the time specified is reasonable, it becomes of the essence of the contract<sup>3</sup>. Stipulations in a contract as to time or otherwise, which according to rules of equity are not deemed to be, or to have become, of the essence of the contract, are also construed and have effect at law in accordance with the same rules<sup>4</sup>.

The fact that equity might decree specific performance to a party who had failed to complete on the specified date does not mean that the express date for completion is to be treated as a mere target date in effect enabling the defaulting party to insert into the contractual provision some such words as 'or within a reasonable time'. The effect of the Law of Property Act 1925<sup>5</sup> is not to negative the existence of a breach of contract where one has occurred; it does not affect a claim for damages for breach of contract where there has been a failure to complete on the specified date<sup>6</sup>.

1 *Steedman v Drinkle* [1916] 1 AC 275, PC. An express deeming provision in a rent review clause may be sufficient to rebut what otherwise would be the presumption that time was not of the essence: *Starmark Enterprises Ltd v CPL Distribution Ltd* [2001] EWCA Civ 1252, [2002] Ch 306, [2002] 4 All ER 264.

2 'Where from the contract, or from the nature of the case, time is not shown to be of the essence of the contract, courts of equity have long been in the habit of relieving against mere lapse of time, where it has been consistent with the substance of justice to do so': *Roberts v Berry* (1853) 3 De GM & G 284 at 290 per Knight Bruce LJ. The doctrine does not apply to commercial contracts: *Reuter v Sala* (1879) 4 CPD 239, CA.

3 *Green v Sevin* (1879) 13 ChD 589; *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch 1, [1991] 2 All ER 477, CA. Note that failure to comply with a notice making time of the essence does not itself constitute a repudiation irrespective of the consequences of the breach: *Re Olympia & York Canary Wharf Ltd (No 2)*, *Bear Sterns International Ltd v Adamson* [1993] BCC 159. A contractual obligation on the purchasers to pay interest if the balance of the purchase money is not paid on the completion date does not apply if the delay in completion is caused by default by the vendors, but does apply if the delay is due to default by the purchasers or to something which is not the fault of either party: see *Newbery v Turngiant Ltd* (1991) 63 P & CR 458, [1992] 3 LS Gaz R 31, CA.

4 Law of Property Act 1925 s 41, replacing in slightly different language the Supreme Court of Judicature Act 1873 s 25(7); and see *Howe v Smith* (1884) 27 ChD 89; *Stickney v Keeble* [1915] AC 386; *Rightside Properties Ltd v Gray* [1975] Ch 72, [1974] 2 All ER 1169; *United Scientific Holdings Ltd v Burnley Borough Council*, *Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904, [1977] 2 All ER 62, HL; *Amherst v James Walker Goldsmith and Silversmith Ltd* [1983] Ch 305, [1983] 2 All ER 1067, CA. As to the law in a case not affected by this enactment see *Noble v Edwardes*, *Edwardes v Noble* (1877) 5 ChD 378, CA; SALE OF LAND vol 42 (Reissue) PARA 255; SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARAS 899-901.

5 In the Law of Property Act 1925 s 41: see the text and note 4 supra.

6 *Raineri v Miles* [1981] AC 1050, [1980] 2 All ER 145, HL. The rule in *Bain v Fothergill* (1874) LR 7 HL 158 ('if a person enters into a contract for the sale of a real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit') was abolished by the Law of Property (Miscellaneous Provisions) Act 1989 s 3. As to the effect of s 3 where a contract is entered into after 26

September 1989 see *Newbery v Turngiant Ltd* (1991) 63 P & CR 458, [1992] 3 LS Gaz R 31, CA, obiter per Dillon LJ.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/6. EQUITABLE RELIEF IN CASES OF FIDUCIARY RELATIONSHIP/(1) TRUSTEES AND OTHER PERSONS IN FIDUCIARY POSITIONS/851. Express trusts.

## 6. EQUITABLE RELIEF IN CASES OF FIDUCIARY RELATIONSHIP

### (1) TRUSTEES AND OTHER PERSONS IN FIDUCIARY POSITIONS

#### 851. Express trusts.

Trusts may arise either by act of parties or by operation of law<sup>1</sup>. An express trust as regards land is a trust expressly declared by a deed, will or other written instrument<sup>2</sup>; as to personalty, other than leaseholds, an express trust may be created orally<sup>3</sup>.

To constitute an express trust three matters must be defined:

- 127 (1) the property subject to the trust;
- 128 (2) the persons to be benefited; and
- 129 (3) the interests which they are to take<sup>4</sup>.

It is not necessary to use the word 'trust'<sup>5</sup>; and the trust is express even if it has to be made out from all the terms of the instrument<sup>6</sup>, although the courts are less ready now than formerly to construe words of recommendation as creating a precatory trust<sup>7</sup>. It is usually sufficient, to establish the relation of trustee and beneficiary, to prove that the legal title is in one person and the equitable title in another<sup>8</sup>.

An express trust of real estate must, by statute<sup>9</sup>, be manifested and proved by some writing signed by the person creating it, but, on the principle that equity will not allow a statute to be used as an instrument of fraud<sup>10</sup>, where a person fraudulently denies that land was conveyed to him as a trustee, oral evidence is admissible to show that he holds upon a trust and to show the trust upon which he holds<sup>11</sup>.

1 See TRUSTS vol 48 (2007 Reissue) PARA 604 et seq.

2 *Petre v Petre* (1853) 1 Drew 371 at 393; *Cunningham v Foot* (1878) 3 App Cas 974 at 984. The effect of the Land Transfer Act 1897 ss 1, 2 (repealed) was to impose an express trust on the personal representatives in respect of real estate: *Toates v Toates* [1926] 2 KB 30. As regards the present law see *Re Ponder, Ponder v Ponder* [1921] 2 Ch 59; *Re Yerburch, Yerburch v Yerburch* [1928] WN 208; *Harvell v Foster* [1954] 2 QB 367, [1954] 2 All ER 736, CA; *Re Cockburn's Will Trusts, Cockburn v Lewis* [1957] Ch 438, [1957] 2 All ER 522; and EXECUTORS AND ADMINISTRATORS.

3 *Harris v Truman* (1881) 7 QBD 340 at 356; on appeal (1882) 9 QBD 264, CA; *Sands v Thompson* (1883) 22 ChD 614.

4 *Malim v Keighley* (1794) 2 Ves 333 at 335; on appeal (1795) 2 Ves 529; *Knight v Knight* (1840) 3 Beav 148 at 173; on appeal (1844) 11 Cl & Fin 513.

5 *Charitable Donations and Bequests Comrs v Wybrants* (1845) 2 Jo & Lat 182 at 189.

6 *Re Williams, Williams v Williams* [1897] 2 Ch 12 at 27, CA. A precatory trust is sometimes regarded as an example of an implied trust.

7 *Lambe v Eames*(1871) 6 Ch App 597 at 599; cf *Re Hanbury, Hanbury v Fisher* [1904] 1 Ch 415, CA (revsd sub nom *Comiskey v Bowring-Hanbury* [1905] AC 84, HL); *Re Steele's Will Trusts, National Provincial Bank Ltd v Steele* [1948] Ch 603, [1948] 2 All ER 193.

8 *Hardoon v Belilios*[1901] AC 118 at 123, PC. The trustee may himself have only an equitable interest, as where eg a trust fund is settled by the beneficiary by way of derivative settlement: see *Stephens v Green, Green v Knight*[1895] 2 Ch 148, CA; and TRUSTS vol 48 (2007 Reissue) PARA 601.

9 le under the Law of Property Act 1925 s 53(1)(b) (replacing the Statute of Frauds (1677) s 7): see TRUSTS vol 48 (2007 Reissue) PARA 644.

10 See PARA 563 ante.

11 *Rochefoucauld v Boustead*[1897] 1 Ch 196, CA; *Hodgson v Marks*[1971] Ch 892, [1970] 3 All ER 513 per Ungood-Thomas J; revsd but not on this point [1971] Ch 892 at 918, [1971] 2 All ER 684, CA; but see *Bannister v Bannister*[1948] 2 All ER 133, CA; *Re Densham (a bankrupt), ex p Trustee of the Bankrupt v Densham*[1975] 3 All ER 726 at 732, [1975] 1 WLR 1519 at 1525 per Goff J; *Ashburn Anstalt v Arnold*[1989] Ch 1, [1988] 2 All ER 147, CA (overruled on a different point by *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, [1992] 3 All ER 504, HL). See further TRUSTS vol 48 (2007 Reissue) PARA 689.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/6. EQUITABLE RELIEF IN CASES OF FIDUCIARY RELATIONSHIP/(1) TRUSTEES AND OTHER PERSONS IN FIDUCIARY POSITIONS/852. Constructive trusts.

## 852. Constructive trusts.

A constructive trust arises when, although there is no express trust affecting specific property, equity considers that the legal owner should be treated as a trustee of an interest in it for another<sup>1</sup>. This happens, for example, where one who is already a trustee takes advantage of his position to obtain a new legal interest in the property<sup>2</sup>, as where a trustee of leaseholds takes a new lease in his own name<sup>3</sup>, or acquires the freehold reversion<sup>4</sup>. Under a contract for the sale of land the vendor is a constructive trustee for the purchaser until completion<sup>5</sup>. Further, someone who is neither a trustee nor owes a fiduciary duty to another can become liable as a constructive trustee. Well-established cases relate to the liability of a person as a recipient of trust property or its traceable proceeds, or where a stranger to the trust is an accessory to a trustee's breach of trust<sup>6</sup>.

The term 'constructive trust' is in fact used to describe two entirely different situations<sup>7</sup>. The first applies to cases where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the claimant, who asserts that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property. In these cases the constructive trustee really is a trustee. The second class of case arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. Such a person is traditionally called a 'constructive trustee' though he is not in fact a trustee at all, even though he may be liable to account as if he were. If he receives the property at all it is adversely to the claimant by an unlawful transaction which is impugned by the claimant. The expression 'constructive trust' in this situation has been judicially described as nothing more than a formula for equitable relief<sup>8</sup>.

1 *Hussey v Palmer* [1972] 3 All ER 744 at 747, [1972] 1 WLR 1286 at 1290, CA, per Lord Denning MR. See also *Binions v Evans* [1972] Ch 359, [1972] 2 All ER 70, CA (trust imposed on a purchaser to protect the rights of a contractual licensee where the sale is subject to the licence); *Ashburn Anstalt v Arnold* [1989] Ch 1, [1988] 2 All ER 147, CA (overruled on a different point by *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, [1992] 3 All ER 504, HL); *Melbury Road Properties 1995 Ltd v Kreidi* [1999] 3 EGLR 108, [1999] 43 EG 457, West London county court; *A-G for Hong Kong v Reid* [1994] 1 AC 324, [1994] 1 All ER 1, PC (a fiduciary who accepts a bribe holds the bribe on constructive trust for the person injured by his breach of duty); and PARA 858 post. The rule has been said to be based on public policy: *Griffin v Griffin* (1804) 1 Sch & Lef 352 at 354; *Blewett v Millett* (1774) 7 Bro Parl Cas 367. As to constructive trusts see TRUSTS vol 48 (2007 Reissue) PARA 687 et seq.

2 See *Pickering v Vowles* (1783) 1 Bro CC 197; *James v Dean* (1805) 11 Ves 383; subsequent proceedings (1808) 15 Ves 236.

3 *Keech v Sandford* (1726) Cas temp King 61; *Rawe v Chichester* (1773) Amb 715 at 719.

4 *Protheroe v Protheroe* [1968] 1 All ER 1111, [1968] 1 WLR 519, CA; *Thompson's Trustee in Bankruptcy v Heaton* [1974] 1 All ER 1239, [1974] 1 WLR 605. Cf *Savage v Dunningham* [1974] Ch 181, [1973] 3 All ER 429.

5 See eg *Green v Smith* (1738) 1 Atk 572 at 573 per Lord Hardwicke LC (the rule is 'that the vendor of the estate is, from the time of his contract, considered as a trustee for the purchaser'); *Shaw v Foster and Pooley* (1872) LR 5 HL 321 at 338 per Lord Cairns; and SALE OF LAND vol 42 (Reissue) PARA 177 et seq.

Since the real property legislation of 1925 a tenant for life of settled land is often a trustee and, by virtue of the legal estate being vested in him on trusts or by virtue of the Settled Land Act 1925 s 107 (as amended) (see

SETTLEMENTS vol 42 (Reissue) PARA 775), an express trustee of the real estate or of his powers. As to the position before 1 January 1926 see *Re Biss, Biss v Biss* [1903] 2 Ch 40, CA and the cases there cited. As to the relations between tenant for life and remainderman see *Dicconson v Talbot* (1870) 6 Ch App 32; *Hickman v Upsall* (1876) 4 ChD 144, CA; and as to the fiduciary position of a person who enters on land belonging to a mentally disordered person, with knowledge of his rights and of his condition, see *Smyth v Byrne* [1914] 1 IR 53, CA. Subject to certain exceptions, no settlement created on or after 1 January 1997 is a settlement for the purposes of the Settled Land Act 1925: see the Trusts of Land and Appointment of Trustees Act 1996 ss 2, 27; and REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS.

6 See *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 at 382, [1995] 3 All ER 97 at 99-100, PC, per Lord Nicholls of Birkenhead, citing *Barnes v Addy* (1874) 3 Ch App 244; *Satnam Investments Ltd v Dunlop Heywood & Co Ltd* [1999] 3 All ER 652, [1999] 1 BCLC 385, CA; *Bank of Credit and Commerce International (Overseas) Ltd (in liq) v Akindele* [2001] Ch 437, [2000] 4 All ER 221, CA. See also TRUSTS vol 48 (2007 Reissue) PARAS 698-704.

7 See *Paragon Finance plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400 at 408-409, CA, per Millet LJ, who said it was regrettable that the same term is used to describe two different situations. See also *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467, [2002] 1 BCLC 162, [2001] All ER (D) 160 (Oct).

8 See *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073 at 1097, [1968] 1 WLR 1555 at 1582 per Ungood-Thomas J.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/6. EQUITABLE RELIEF IN CASES OF FIDUCIARY RELATIONSHIP/(1) TRUSTEES AND OTHER PERSONS IN FIDUCIARY POSITIONS/853. Resulting trusts.

### 853. Resulting trusts.

A resulting trust may arise solely by operation of law, as where, upon a purchase of land, one person provides the purchase money and the conveyance is taken in the name of another; there is then a presumption of a resulting trust in favour of the person providing the money, unless from the relation between the two, or from other circumstances, it appears that a gift was intended<sup>1</sup>. There is likewise a presumption of a resulting trust where there is a voluntary transfer of pure personalty into the name of another<sup>2</sup> or into the joint names of the grantor and another<sup>3</sup>, but probably not in the case of a voluntary conveyance of land<sup>4</sup>. These two categories of purchase in the name of another and voluntary transfer into the name of another have been classified as 'presumed resulting trusts' because they depend upon the presumed intention of the grantor<sup>5</sup>. There is also another class of resulting trust, classified as an 'automatic resulting trust' because it does not depend on any intentions or presumptions, where the creation of the trust is express, although, in the events which happen, the beneficial destination of the property is undetermined. This is the case when there is an entire or partial failure of the objects of the trust, and then, to the extent of the failure, the benefit of the trust results automatically to the settlor or his representatives<sup>6</sup>.

1 *Dyer v Dyer* (1788) 2 Cox Eq Cas 92 at 93 per Eyre CB; 2 White & Tud LC (9th Edn) 789; and see *Fung Ping Shan v Tong Shun* [1918] AC 403, PC; *Savage v Dunningham* [1974] Ch 181, [1973] 3 All ER 429 (A, B and C had shared the rent of a flat and A acquired a 62-year lease for which he paid a premium; A did not hold that lease on a resulting trust). As to resulting trusts see TRUSTS vol 48 (2007 Reissue) PARA 705 et seq.

2 *Fowkes v Pascoe* (1875) 10 Ch App 343 at 348; *Vandervell v IRC* [1967] 2 AC 291, [1967] 1 All ER 1, HL.

3 *Re Vinogradoff*, *Allen v Jackson* [1935] WN 68.

4 See the Law of Property Act 1925 s 60(3); and *Lohia v Lohia* [2001] EWCA Civ 1691, [2001] All ER (D) 375 (Oct).

5 *Re Vandervell's Trusts (No 2)*, *White v Vandervell Trustees Ltd* [1974] Ch 269 at 287 et seq, [1974] 1 All ER 47 at 63 et seq per Megarry J; revsd without discussing this classification [1974] Ch 269 at 308, [1974] 3 All ER 205, CA.

6 *Salter v Cavanagh* (1838) 1 Dr & Wal 668; *Patrick v Simpson* (1889) 24 QBD 128. In *Vandervell v IRC* [1967] 2 AC 291, [1967] 1 All ER 1, HL, the beneficial trusts of an option to purchase shares were not defined and the option was held on a resulting trust for the settlor.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/6. EQUITABLE RELIEF IN CASES OF FIDUCIARY RELATIONSHIP/(1) TRUSTEES AND OTHER PERSONS IN FIDUCIARY POSITIONS/854. Persons in a confidential position.

## 854. Persons in a confidential position.

Apart from the creation of trusts of specific property, the position held by a person may itself involve confidence so as to impress him with a fiduciary character. A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty<sup>1</sup>. This is so in most cases of agency, since the agent has duties to perform which involve the placing of confidence in him by the principal<sup>2</sup>. On the same footing are directors<sup>3</sup> and promoters<sup>4</sup> of companies. A receiver and a trustee in bankruptcy hold property received by them in a fiduciary capacity<sup>5</sup>, but a partner does not receive the assets of the partnership on account of himself and his partners in a fiduciary capacity<sup>6</sup>, although he may be a trustee of particular assets when the partnership has ceased<sup>7</sup>. A banker is not usually in a fiduciary position as regards his customer<sup>8</sup>, but he may assume that position<sup>9</sup>; and, where there is a relationship of confidentiality between banker and customer, the court may intervene to prevent the relationship from being abused<sup>10</sup>.

Not all duties owed by a fiduciary are fiduciary duties. The expression 'fiduciary duty' is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. It is inappropriate to apply the expression to the obligation of a trustee or other fiduciary to use proper skill and care in the discharge of his duties<sup>11</sup>. Thus a director's duty to exercise care and skill is not a fiduciary duty although it is a duty actionable in the equitable jurisdiction of the court<sup>12</sup>, and a claim for an account brought by a principal against his agent is based on a contractual duty not a fiduciary duty and is accordingly barred by the statutes of limitation unless the agent is more than a mere agent but is a trustee of the money which he has received<sup>13</sup>. The core liability of the fiduciary arises from the single-minded loyalty of the fiduciary to which his principal is entitled. Thus, inter alia, the fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. Breach of any of these duties attracts those remedies which are peculiar to the equitable jurisdiction. They are primarily restitutionary or restorative, though exceptionally equitable compensation may be awarded in lieu<sup>14</sup>.

1 *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1998] Ch 1 at 18, [1996] 4 All ER 698 at 711-712, CA, per Millett LJ; *Satnam Investments Ltd v Dunlop Heywood & Co Ltd* [1999] 3 All ER 652, [1999] 1 BCLC 385, CA.

2 *Burdick v Garrick* (1870) 5 Ch App 233; *Lyell v Kennedy*, *Kennedy v Lyell* (1889) 14 App Cas 437 at 463; and see *Friend v Young* [1897] 2 Ch 421 at 432. As to the fiduciary nature of an agent's employment see *Morison v Moat* (1851) 9 Hare 241 at 255 (affd (1852) 21 LJ Ch 248); *Padwick v Stanley* (1852) 9 Hare 627; *Crowther v Elgood* (1887) 34 ChD 691, CA; *Lamb v Evans* [1893] 1 Ch 218, CA; *Robb v Green* [1895] 2 QB 315, CA; and AGENCY vol 1 (2008) PARAS 73, 76, 89; but an agency is not necessarily fiduciary. A solicitor or other agent who receives money merely for transmission to his principal is not trustee of it (*Re Hindmarsh* (1860) 1 Drew & Sm 129); to become such he must have duties to perform in the disposition of the property, eg to invest or manage it (*Gray v Bateman* (1872) 21 WR 137; *Power v Power*, *Mulcahy's Claim* (1884) 13 LR Ir 281; *Dooby v Watson* (1888) 39 ChD 178). As to whether a broker owes a fiduciary duty to his clients see *Brandeis (Brokers) Ltd v Herbert Black* [2001] 2 All ER (Comm) 980, [2001] 2 Lloyd's Rep 359. A person agreeing to negotiate the purchase of a freehold on behalf of a group of tenants of whom he was one was held to have assumed fiduciary obligations to the other members of the group in *Hooper v Gorvin* [2000] All ER (D) 2165.

3 *Re Exchange Banking Co, Flitcroft's Case* (1882) 21 ChD 519, CA; and see *Re Forest of Dean Mining Co* (1878) 10 ChD 450 at 453; *Cook v Deeks* [1916] 1 AC 554 at 563; *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467, [2002] 1 BCLC 162, [2001] All ER (D) 160 (Oct).

4 *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 at 1236.

5 *Seagram v Tuck* (1881) 18 ChD 296; *Re Gent, Gent-Davis v Harris* (1888) 40 ChD 190. A person who receives money on behalf of another, and retains and has the benefit of it, may be charged in equity with interest: see *Barclay v Harris and Cross* (1915) 112 LT 1134. As to default by a trustee or person acting in a fiduciary capacity see the Debtors Act 1869 s 4 para 3; and CONTEMPT OF COURT vol 9(1) (Reissue) PARA 485.

6 *Piddocke v Burt* [1894] 1 Ch 343 (decided under the Debtors Act 1869 s 4 para 3). As to stockbrokers see PARA 861 note 8 post.

7 See *Gordon v Gonda* [1955] 2 All ER 762 at 767, [1955] 1 WLR 885 at 895, CA (an invention which was a partnership asset was sold by one partner to a company; the other partner was held to be beneficially entitled to a proportion of the shares acquired as a result of the sale and subsequent exchange of shares).

8 *Foley v Hill* (1848) 2 HL Cas 28.

9 *Woods v Martins Bank Ltd* [1959] 1 QB 55, [1958] 3 All ER 166.

10 See PARAS 417, 428 ante; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 815 et seq.

11 See *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 205, [1994] 3 All ER 506 at 543, HL, per Lord Browne-Wilkinson; *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1998] Ch 1, [1996] 4 All ER 698, CA (where the position of a fiduciary properly acting for two principals with potentially conflicting interests is discussed); *Paragon Finance plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400 at 415-416, CA, per Millett LJ, disapproving *Nelson v Rye* [1996] 2 All ER 186, [1996] 1 WLR 1378; *Coulthard v Disco Mix Club Ltd* [1999] 2 All ER 457, [2000] 1 WLR 707; *Cia de Seguros Imperio v Heath (REBX) Ltd (formerly CE Heath & Co (North America) Ltd)* [2000] 2 All ER (Comm) 787, [2001] 1 WLR 112, CA.

12 See *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1998] Ch 1 at 17, [1996] 4 All ER 698 at 711, CA, per Millett LJ, indorsing the comments of Ipp J in *Permanent Building Society (in liq) v Wheeler* (1994) 14 ACSR 109 at 157-158, W Aust SC.

13 *Paragon Finance plc v DB Thakerar & Co (a firm)* [1999] 2 All ER 400, CA.

14 *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1998] Ch 1, [1996] 4 All ER 698, CA. See also *Ward v Brunt* [2000] All ER (D) 586 (partners had tenancy in farm; one partner, S, acquired freehold reversion at tenanted value pursuant to an option granted to her in the owner's will; held that S was not profiting from her position as a fiduciary when she acquired the reversion).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/6. EQUITABLE RELIEF IN CASES OF FIDUCIARY RELATIONSHIP/(1) TRUSTEES AND OTHER PERSONS IN FIDUCIARY POSITIONS/855. Breach of confidence.

### **855. Breach of confidence.**

A person who has confidential information belonging to another may be restrained by injunction from using it without the owner's consent<sup>1</sup>; but the court will act only at the instance of the party to whom the duty of confidence is owed<sup>2</sup>. The right can arise out of a contract whereby one party ('the confidant') undertakes that he will maintain the confidentiality of information directly or indirectly made available to him by the other party ('the confider') or acquired by him in a situation, for example his employment, created by the confider<sup>3</sup>. It can also arise as a necessary or traditional incident of a relationship between the confidant and the confider<sup>4</sup>; and the Crown, as the embodiment of the nation as a whole, has an enforceable right to the maintenance of confidentiality over information relating to national security<sup>5</sup>. It has been said that, in restraining an employee from making use of or communicating confidential information which he has gained in the course of his employment, the court rests its jurisdiction upon the ground of implied contract and breach of trust or confidence<sup>6</sup>, but it is now clear that, with regard to such information, the person who possesses it is under an obligation binding his conscience and existing quite apart from contract<sup>7</sup>, the law on the protection of confidential information depending on the broad principle of equity that he who has received information in confidence must not take unfair advantage of it<sup>8</sup>. The obligation does not exist where there has been misconduct of such a nature that it ought in the public interest to be disclosed to others<sup>9</sup>; and equity will not grant an injunction to restrain the publication of information that is perfectly useless<sup>10</sup> or of pernicious nonsense<sup>11</sup>. Once confidential information is no longer secret, for example, because it has been made public by an application for a patent, disclosure of it cannot necessarily be protected by an injunction<sup>12</sup>; it will depend on the circumstances of the particular case<sup>13</sup>. Where, however, confidential information has been made public by the person under the obligation of confidence, the person to whom the obligation is owed may still be entitled to protection by way of injunction<sup>14</sup>. Information which is merely 'know-how' will not be protected<sup>15</sup>; and it has been held that there is no requirement of confidentiality in relation to poll votes<sup>16</sup>. A third party who comes into possession of confidential information may come under a duty to respect that confidence<sup>17</sup>.

Breach of confidence is a developing area of the law, the boundaries of which are not immutable, but may change to reflect changes in society, technology and business practice<sup>18</sup>. There is no watertight division between it and a right of privacy<sup>19</sup>; indeed, it has been held that in the great majority of situations, if not all situations, where the protection of privacy is justified, relating to events after the Human Rights Act 1998 came into force<sup>20</sup>, a claim for breach of confidence will, where this is appropriate, provide the necessary protection<sup>21</sup>. A duty of confidence arises whenever the party alleged to be subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected. If there is an intrusion in such a situation it will be capable of giving rise to liability in a claim for breach of confidence unless the intrusion can be justified<sup>22</sup>.

The question whether a duty of confidentiality which has been expressly assumed under contract carries more weight, when balanced against the restriction of the right to freedom of expression, than a duty of confidentiality that is not buttressed by express agreement is not suitable for summary determination<sup>23</sup>.

1 *Yovatt v Winyard* (1820) 1 Jac & W 394; *Evitt v Price* (1827) 1 Sim 483; *Morison v Moat* (1851) 9 Hare 241 at 255; *Gartside v Outram* (1856) 26 LJ Ch 113 at 114; *Amber Size and Chemical Co Ltd v Menzel* [1913] 2 Ch 239; *Gunston v Winox Ltd* (1920) 37 TLR 74 (revsd on another ground [1921] 1 Ch 664, CA); *Cranleigh Precision Engineering Ltd v Bryant* [1964] 3 All ER 289, [1965] 1 WLR 1293; and see *Beer v Ward* (1821) Jac 77 (injunction refused); *Philip v Pennell* [1907] 2 Ch 577 at 587; *X v Y* [1988] 2 All ER 648 (disclosure of hospital records to reveal identity of AIDS patients); *R v Department of Health, ex p Source Informatics Ltd* [2001] QB 424, [2000] 1 All ER 786, CA (in a case involving personal confidences, the disclosure of information by the confidant would not constitute a breach of confidence provided that the confider's identity was protected). See also PARA 477 et seq ante; and CIVIL PROCEDURE vol 11 (2009) PARAS 475-476.

2 *Fraser v Evans* [1969] 1 QB 349, [1969] 1 All ER 8, CA. The confidential communication of an idea which has never been reduced to writing is protected by the law of confidence, provided the idea is original, clearly identifiable, has potential commercial merit and is sufficiently well developed to be capable of realisation: *Fraser v Thames Television Ltd* [1984] QB 44, [1983] 2 All ER 101.

3 *A-G v Jonathan Cape Ltd, A-G v Times Newspapers Ltd* [1976] QB 752, [1975] 3 All ER 484; *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 233; sub nom *A-G v Guardian Newspapers Ltd (No 2)*, *A-G v Times Newspapers Ltd* [1988] 3 All ER 545, HL. Cf *Burmah Oil Co Ltd v Governor and Company of the Bank of England* [1980] AC 1090, [1979] 3 All ER 700, HL; *Intelsec Systems Ltd v Grech-Cini* [1999] 4 All ER 11, [2000] 1 WLR 1190. See also *De Maudsley v Palumbo* [1996] FSR 447, [1996] EMLR 460 (no breach of confidence in relation to ideas for nightclub, as ideas were too vague to constitute original or confidential information, and were imparted on a social occasion).

4 Eg priest and penitent, doctor and patient, lawyer and client, husband and wife. See *Bunn v BBC* [1998] 3 All ER 552, [1998] 28 LS Gaz R 31 (statement made under caution by accused to police is confidential). See also *A v B* [2000] IP & T 1368, [2000] EMLR 1007, where a husband took copies of private and confidential entries in his wife's diary without her knowledge or consent; it was held that since the matter fell within the equitable jurisdiction the court must have a discretion whether to order up delivery of copies taken.

5 See the cases cited in note 3 supra.

6 *Tippling v Clarke* (1847) 8 LTOS 554; *Prince Albert v Strange* (1849) 1 Mac & G 25 at 44-45; *Morison v Moat* (1851) 9 Hare 241 (affd (1852) 21 LJ Ch 248); *Tuck & Sons v Priestler* (1887) 19 QBD 629, CA; *Pollard v Photographic Co* (1888) 40 ChD 345; *Merryweather v Moore* [1892] 2 Ch 518; *Lamb v Evans* [1893] 1 Ch 218, CA; *Robb v Green* [1895] 2 QB 315, CA. The statement of Eve J in *Kirchner & Co v Gruban* [1909] 1 Ch 413 at 422, that the real principle upon which the court acted was that of implied contract, must, in view of *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413n, CA and later cases (see note 7 infra), be treated as too limited.

7 *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413n at 414n, CA, per Lord Greene MR; *Cranleigh Precision Engineering Co Ltd v Bryant* [1964] 3 All ER 289 at 301, [1965] 1 WLR 1293 at 1317-1319 per Roskill J; *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* [1969] RPC 128, CA; and see *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402, [1964] 1 WLR 96; *Industrial Furnaces Ltd v Reaves* [1970] RPC 605; *Baker v Gibbons* [1972] 2 All ER 759 at 764, [1972] 1 WLR 693 at 699; *New Zealand Netherlands Society Oranje Inc v Kuys* [1973] 2 All ER 1222, [1973] 1 WLR 1126, PC; *Faccenda Chicken Ltd v Fowler, Fowler v Faccenda Chicken Ltd* [1987] Ch 117, [1986] 1 All ER 617, CA. It is, however, doubtful whether in the absence of any contract, express or implied, damages can be awarded for breach of confidence except in lieu of an injunction: *Nichrotherm Electrical Co Ltd v Percy* [1957] RPC 207 at 213-214, CA. In *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 233; sub nom *A-G v Guardian Newspapers Ltd (No 2)*, *A-G v Times Newspapers Ltd* [1988] 3 All ER 545, HL, Lord Goff of Chieveley explained at 286 and at 662 the availability of damages as alternative to an account despite the equitable nature of the wrong as a result of 'a beneficent interpretation of the Chancery Amendment Act 1858 (Lord Cairns's Act)'. Damages are assessed on the market value of the information as between a willing buyer and a willing seller: *Seager v Copydex Ltd (No 2)* [1969] 2 All ER 718, [1969] 1 WLR 809, CA; distinguished in *Dowson & Mason Ltd v Potter* [1986] 2 All ER 418, [1986] 1 WLR 1419, CA. See also *De Maudsley v Palumbo* [1996] FSR 447, [1996] EMLR 460; DAMAGES vol 12(1) (Reissue) PARA 1126; and EMPLOYMENT vol 39 (2009) PARA 55 et seq.

.1

5. <sup>8</sup> *Seager v Copydex Ltd* [1967] 2 All ER 415 at 417, [1967] 1 WLR 923 at 931, CA, per Lord Denning MR; *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 233; sub nom *A-G v Guardian Newspapers Ltd (No 2)*, *A-G v Times Newspapers Ltd* [1988] 3 All ER 545, HL. See also *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1, [1981] 2 All ER 321, CA (journalist obtaining confidential information during employment as professional adviser under a fiduciary obligation not to use it for his own purposes); *Stephens v Avery* [1988] Ch 449, [1988] 2 All ER 477 (information relating to sexual conduct may be the subject of legally

enforceable duty of confidentiality); *De Maudsley v Palumbo* [1996] FSR 447, [1996] EMLR 460. Employment cases include *Printers and Finishers Ltd v Holloway* [1965] 1 WLR 1; *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41; *AT Poeton (Gloucester Plating) Ltd v Horton* [2000] IP & T 1064, [2001] FSR 169, CA; *Dranez Anstalt v Hayek* [2002] 1 BCLC 693, [2001] All ER (D) 336 (Dec) (revsd in part [2002] EWCA Civ 1729, [2003] 1 BCLC 278, [2002] All ER (D) 377 (Nov)). Persons who disclose documents (on discovery, now known as 'disclosure': see CIVIL PROCEDURE vol 11 (2009) PARA 538 et seq) are entitled to the court's protection against any use of the documents otherwise than in the proceedings in which they were disclosed: *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] QB 613, [1975] 1 All ER 41.

5

9 *Initial Services Ltd v Putterill* [1968] 1 QB 396 at 405, [1967] 3 All ER 145 at 148, CA, per Lord Denning MR. 'There is no confidence as to the disclosure of iniquity': *Gartside v Outram* (1856) 26 LJ Ch 113 at 114 per Sir William Page-Wood V-C. See also *Fraser v Evans* [1969] 1 QB 349 at 362, [1969] 1 All ER 8 at 11, CA, per Lord Denning MR; *Butler v Board of Trade* [1971] Ch 680 at 690, [1970] 3 All ER 593 at 599 per Goff J; *Hubbard v Vosper* [1972] 2 QB 84, [1972] 1 All ER 1023, CA; *Beloff v Pressdram Ltd* [1973] 1 All ER 241; *Church of Scientology of California v Kaufman* [1973] RPC 635; *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133 at 140-141, [1972] 3 All ER 813 at 818, CA, per Lord Denning MR (on appeal [1974] AC 133 at 152, [1973] 2 All ER 943, HL); *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408, [1984] 1 WLR 892, CA; applied in *Lion Laboratories v Evans* [1985] QB 526, [1984] 2 All ER 417, CA; *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 233; sub nom *A-G v Guardian Newspapers Ltd (No 2)*, *A-G v Times Newspapers Ltd* [1988] 3 All ER 545, HL; *Re a Company's Application* [1989] Ch 477, [1989] 2 All ER 248 (no injunction to restrain employee from disclosing confidential information to regulatory authorities or Inland Revenue); *Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583, (1991) Times, 30 October (declaration in favour of auditors wishing to disclose confidential information to inquiry set up to review Bank of England's past performance of supervisory functions; overruled on the question of legal professional privilege by *R (on the application of Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2002] UKHL 21, [2003] 1 AC 563, [2002] 3 All ER 1). There are, however, some cases of breach of confidence which are defamatory where the court might intervene, even though the defendant says that he intends to justify: *Fraser v Evans* [1969] 1 QB 349 at 362, [1969] 1 All ER 8 at 11, CA, per Lord Denning MR; and see LIBEL AND SLANDER vol 28 (Reissue) PARA 8. Negligence does not constitute an exception to the need to protect confidentiality: *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] QB 613 at 622, [1975] 1 All ER 41 at 49-50 obiter per Talbot J.

10 *McNicol v Sportsman's Book Stores* (1930) Mac G Cop Cas (1928-1935) 116; cited in *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 149; sub nom *A-G v Guardian Newspapers Ltd (No 2)*, *A-G v Times Newspapers Ltd* [1988] 3 All ER 545 at 574 per Scott J (affd [1990] 1 AC 109, [1988] 3 All ER 545, CA and HL).

11 *Church of Scientology of California v Kaufman* [1973] RPC 635.

12 *O Mustad & Son v S Allcock & Co Ltd and Dosen* [1963] 3 All ER 416; sub nom *Mustad & Son v Dosen* [1964] 1 WLR 109n, HL. Cf *Exchange Telegraph Co Ltd v Central News Ltd* [1897] 2 Ch 48; *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1, [1981] 2 All ER 321, CA. See *Bunn v BBC* [1998] 3 All ER 552, [1998] 28 LS Gaz R 31 (confidentiality of a statement made under caution by an accused at an end because the contents of the statement were already in the public domain having been read in open court by the judge. There is no distinction between a document which the judge reads and a document which is read to the judge).

13 See *Franchi v Franchi* [1967] RPC 149 at 152-153 per Cross J; *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 233; sub nom *A-G v Guardian Newspapers Ltd (No 2)*, *A-G v Times Newspapers Ltd* [1988] 3 All ER 545, HL. See also *ABK Ltd v Foxwell* [2002] EWHC 9 (Ch), [2002] All ER (D) 103 (Jan) (relevant disclosures of information did not amount to breach of confidence as they all related to matters in the public domain); *Inline Logistics Ltd v UCI Logistics Ltd* [2001] EWCA Civ 1613, [2002] IP & T 444, [2001] All ER (D) 166 (Oct).

14 *Speed Seal Products Ltd v Paddington* [1986] 1 All ER 91, [1985] 1 WLR 1327, CA. Cf *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 233; sub nom *A-G v Guardian Newspapers Ltd (No 2)*, *A-G v Times Newspapers Ltd* [1988] 3 All ER 545, HL.

15 *Amway Corp v Eurway International Ltd* [1974] RPC 82; *Faccenda Chicken Ltd v Fowler, Fowler v Faccenda Chicken Ltd* [1987] Ch 117, [1986] 1 All ER 617, CA.

16 *Haarhaus & Co GmbH v Law Debenture Trust Corp plc* [1988] BCLC 640.



17 *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1, [1981] 2 All ER 321, CA; *Fraser v Thames Television Ltd* [1984] QB 44, [1983] 2 All ER 101; *A-G v Observer Ltd*, *A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 233; sub nom *A-G v Guardian Newspapers Ltd (No 2)*, *A-G v Times Newspapers Ltd* [1988] 3 All ER 545, HL. Cf *R v Tompkins* (1977) 67 Cr App Rep 181, CA.

As to the extent to which the police owe a duty of confidence (1) to the owners of seized documents see *Marcel v Metropolitan Police Comr* [1992] Ch 225, [1992] 1 All ER 72, CA; and (2) to an offender photographed in police custody see *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473, [1995] 1 WLR 804.

18 See *Douglas v Hello! Ltd* [2001] QB 967 at 1011, [2001] 2 All ER 289 at 329, CA (para 165), per Keene LJ.

19 See note 18 supra.

20 Ie on 2 October 2000: see the Human Rights Act 1998 (Commencement No 2) Order 2000, SI 2000/1851, art 2.

21 See *A v B (a company)* [2002] EWCA Civ 337 at [4], [2003] QB 195, [2002] 2 All ER 545 per Lord Woolf CJ giving the judgment of the court.

22 See *A v B (a company)* [2002] EWCA Civ 337 at [11], [2003] QB 195, [2002] 2 All ER 545 (guidelines to apply in dealing with claims such as the claim in that case, where a footballer with a Premier League club sought an injunction preventing a national newspaper from publishing stories about his adulterous affairs; the court has to balance the two potentially conflicting provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969), as set out in the Human Rights Act 1998 s 1(3), Sch 1, ie Sch 1 Pt I art 8 (right to respect for private and family life) and Sch 1 Pt I art 10 (right to freedom of expression)). The court also considered the impact of s 12 which provides, inter alia, that an injunction to restrain publication before trial should not be granted unless the court is satisfied that the applicant is likely to establish that publication should not be allowed: see s 12(3). On the facts the appeal against the interim injunction which had been awarded was allowed.

See also *Venables v News Group Newspapers Ltd*, *Thompson v News Group Newspapers Ltd* [2001] Fam 430, [2001] 1 All ER 908; *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373, [2003] QB 633, [2003] 1 All ER 224; and see generally CONFIDENCE AND DATA PROTECTION.

23 See *Campbell v Frisbee* [2002] EWCA Civ 1374, [2003] ICR 141, [2003] IP & T 86.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/6. EQUITABLE RELIEF IN CASES OF FIDUCIARY RELATIONSHIP/(1) TRUSTEES AND OTHER PERSONS IN FIDUCIARY POSITIONS/856. Conflict of duty and interest.

## 856. Conflict of duty and interest.

A court of equity imposes special liabilities and duties upon persons who stand in a fiduciary relationship to others; and it is a principle of equity that no person having duties of a fiduciary nature to discharge should be allowed to place himself in a situation where he has, or can have, a personal interest conflicting, or which may possibly conflict, with the interest of those whom he is bound to protect<sup>1</sup>. The principle extends not only to the relationship between trustee and beneficiary<sup>2</sup>, but to all kinds of fiduciary relationships<sup>3</sup> where a real<sup>4</sup> conflict of duty and interest occurs; it is not dependent on fraud or absence of good faith<sup>5</sup>.

It is essentially a rule for the protection of the person to whom the duty is owed, who may relax it if he is of full age and capacity and understands what his legal rights are and that he is surrendering them<sup>6</sup>. The court may relax it if the beneficiaries are not sui juris or are not ascertained, and it is expedient to do so<sup>7</sup>. It seems that an agreement contravening the rule is not in itself unlawful or void and that the person owing the duty is not entitled to the benefit of the rule<sup>8</sup>.

1 *Aberdeen Rly Co v Blaikie Bros* (1854) 1 Macq 461 at 471, HL, per Lord Cranworth LC; *Broughton v Broughton* (1855) 5 De GM & G 160; *Bray v Ford* [1896] AC 44 at 51, HL, per Lord Herschell; *Cook v Deeks* [1916] 1 AC 554, PC; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134n, [1942] 1 All ER 378, HL; *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606, [1963] 1 All ER 716, CA.

2 See PARAS 857-859 post.

3 Eg between an agent and his principal (see AGENCY vol 1 (2008) PARA 73), a company and its directors (see *Horcal Ltd v Gatland* [1983] BCLC 60; affd [1984] BCLC 549, CA; and COMPANIES vol 14 (2009) PARA 535), and a solicitor and his client (see LEGAL PROFESSIONS vol 66 (2009) PARA 814 et seq).

4 *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 at 638, [1963] 1 All ER 716 at 730, CA, per Upjohn LJ.

5 *Aberdeen Rly Co v Blaikie Bros* (1854) 1 Macq 461 at 471, HL, per Lord Cranworth LC; *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 at 635, [1963] 1 All ER 716 at 729, CA, per Upjohn LJ.

6 *Kregor v Hollins* (1913) 109 LT 225, CA; *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 at 636, [1963] 1 All ER 716 at 729, CA, per Upjohn LJ.

7 *Re Macadam, Dallow v Codd* [1946] Ch 73 at 82, [1945] 2 All ER 664 at 672.

8 *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 at 637, [1963] 1 All ER 716 at 730, CA, per Upjohn LJ.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/6. EQUITABLE RELIEF IN CASES OF FIDUCIARY RELATIONSHIP/(1) TRUSTEES AND OTHER PERSONS IN FIDUCIARY POSITIONS/857. Purchase of trust property by trustee.

### **857. Purchase of trust property by trustee.**

The principle of equity that a trustee may not purchase part of the trust estate rests on two reasons:

- 130 (1) that a person may not be both vendor and purchaser; and
- 131 (2) that there must not be a conflict of duty and interest<sup>1</sup>.

In a case where the reasons behind the rule do not exist, it will not, however, necessarily be applied<sup>2</sup>. At all events, a purchase by a trustee of trust property is not void, but only voidable at the instance of a beneficiary under the trust, who will be able to have the transaction set aside only on terms as to repayment<sup>3</sup>.

Nor is the rule absolute with regard to a purchase by the trustee after he has ceased to be a trustee, or when he purchases with the consent of his beneficiary. He may retire from being a trustee and divest himself of that character in order to qualify himself to become a purchaser<sup>4</sup>; and the sale will then be good if he has taken this step sufficiently long before the sale to avoid the possibility of his making use of special information acquired by him as trustee<sup>5</sup>; or, without ceasing to be trustee, he may enter into a contract of sale with the beneficiary. Such a contract will be looked at with jealousy, but it will be supported if it is distinct and clear, if it appears that the beneficiary intended that the trustee should buy, and if there is neither fraud, concealment nor advantage taken by the trustee of information acquired by him in his character of trustee<sup>6</sup>.

A provision in the trust instrument authorising a purchase by a trustee will be effective according to its terms<sup>7</sup>.

<sup>1</sup> See PARA 856 ante; and TRUSTS vol 48 (2007 Reissue) PARA 926 et seq. The principle applies also to other persons in a fiduciary position, such as agents (see AGENCY vol 1 (2008) PARAS 73, 89), auctioneers (see AUCTION vol 2(3) (Reissue) PARA 218 et seq) and solicitors (see LEGAL PROFESSIONS vol 66 (2009) PARA 814 et seq).

<sup>2</sup> *Holder v Holder* [1968] Ch 353 at 392, [1968] 1 All ER 665 at 672, CA, per Harman LJ.

<sup>3</sup> *Holder v Holder* [1968] Ch 353 at 398, [1968] 1 All ER 665 at 677, CA, per Danckwerts LJ; and see TRUSTS vol 48 (2007 Reissue) PARA 938.

<sup>4</sup> *Downes v Grazebrook* (1817) 3 Mer 200 at 208.

<sup>5</sup> *Ex p James* (1803) 8 Ves 337 at 352; and see *Re Boles and British Land Co's Contract* [1902] 1 Ch 244.

<sup>6</sup> *Coles v Trecothick* (1804) 9 Ves 234 at 247; and see TRUSTS vol 48 (2007 Reissue) PARA 944 et seq.

<sup>7</sup> *Sargeant v National Westminster Bank plc* (1990) 61 P & CR 518, CA; *Edge v Pensions Ombudsman* [1998] Ch 512, [1998] 2 All ER 547; affd [2000] Ch 602, [1999] 4 All ER 546, CA.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/6. EQUITABLE RELIEF IN CASES OF FIDUCIARY RELATIONSHIP/(1) TRUSTEES AND OTHER PERSONS IN FIDUCIARY POSITIONS/858. Trustee not allowed to make a profit.

### **858. Trustee not allowed to make a profit.**

It follows from the rule that a person will not be allowed to put himself in a position where his interest and duty conflict that a person in a fiduciary position is not allowed, unless otherwise expressly provided, to make a profit out of his trust<sup>1</sup>. This rule obliges him to account for any advantages which he has obtained by reason of his ownership of the trust property. Benefits acquired by him as the owner of the property cannot be retained, but must be surrendered for the advantage of those beneficially interested<sup>2</sup>. Thus, if the trustee retains trust money in his own hands, he is charged with interest<sup>3</sup>; and, if he mixes it with his own money and employs it in his business, the beneficiary is entitled to take a proportionate share of the profit of the business instead of interest<sup>4</sup>.

The Privy Council has held that a fiduciary who accepts a bribe holds the bribe on constructive trust for the person injured by his breach of duty, and is not entitled to retain any increase in value of property purchased with the bribe<sup>5</sup>.

1 *Bray v Ford* [1896] AC 44 at 51, HL, per Lord Herschell; and see *Parker v McKenna* (1874) 10 Ch App 96 at 118; *Re North Australian Territory Co, Archer's Case* [1892] 1 Ch 322, CA; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134n, [1942] 1 All ER 378, HL. See also *Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721, HL. A person who in the course of employment obtains a contract for himself is liable to account to his employer for the profit which he makes, even if it can be shown that the employer would never have obtained the contract: *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162, [1972] 1 WLR 443; *Horcal Ltd v Gatland* [1983] BCLC 60; affd [1984] BCLC 549, CA; cf *New Zealand Netherlands Society Oranje Inc v Kuys* [1973] 2 All ER 1222, [1973] 1 WLR 1126, PC (special arrangement displacing duty); and see COMPANIES vol 14 (2009) PARA 539. The rule applies as much to a custodian trustee as to an ordinary trustee: *Re Brooke Bond & Co Ltd's Trust Deed, Brooke v Brooke Bond & Co Ltd* [1963] Ch 357, [1963] 1 All ER 454.

2 *Aberdeen Town Council v Aberdeen University* (1877) 2 App Cas 544 at 549, HL, per Lord Cairns. Upon this consideration is based the constructive trust raised where the trustee renews a lease in his own favour: see *Smyth v Byrne* [1914] 1 IR 53, CA. The purpose of imposing a proprietary remedy is not to compensate the beneficiary but to ensure that the fiduciary does not profit from his breach of duty: *United Pan-Europe Communications NV v Deutsche Bank AG* [2000] 2 BCLC 461, CA.

3 *A-G v Alford* (1855) 4 De GM & G 843.

4 *Docker v Somes* (1834) 2 My & K 655; *Lord Provost, Magistrates and Town Council of Edinburgh v Lord Advocate* (1879) 4 App Cas 823, HL. The principle applies also where a person who is not expressly a trustee has bought or trafficked with another's money: *Docker v Somes* supra at 665. In such a case the constructive trustee is, however, entitled to an allowance for his time and care: *Brown v Litton* (1711) 1 P Wms 140; and see TRUSTS vol 48 (2007 Reissue) PARA 937.

5 *A-G for Hong Kong v Reid* [1994] 1 AC 324, [1994] 1 All ER 1, PC, doubting *Lister v Stubbs* (1890) 45 ChD 1, CA. It was pointed out in *A-G v Blake* [1997] Ch 84, [1996] 3 All ER 903 (revsd [1998] Ch 439, [1998] 1 All ER 833, CA; [2001] 1 AC 268, [2000] 4 All ER 385, HL, without advertent to this point) that the advice of the Privy Council is technically not binding on the English courts. However it is thought likely that if the point were to come before the House of Lords *Lister v Stubbs* supra would be overruled.

## **UPDATE**

### **858 Trustee not allowed to make a profit**

NOTE 5--See *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch), [2005] Ch 119; and TRUSTS vol 48 (2007 Reissue) PARA 697.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/6. EQUITABLE RELIEF IN CASES OF FIDUCIARY RELATIONSHIP/(1) TRUSTEES AND OTHER PERSONS IN FIDUCIARY POSITIONS/859. Trustee not entitled to remuneration under the equitable rules.

### **859. Trustee not entitled to remuneration under the equitable rules.**

Until its recent modification by statute<sup>1</sup>, the rule was inflexibly established that, in the absence of a remuneration clause, an express order of the court or an express stipulation on the subject which a trustee made with the beneficiary before he accepted the trust<sup>2</sup>, a trustee was to have no allowance for his time and care<sup>3</sup>, although he was entitled to his expenses<sup>4</sup>, for which he had a first charge on the trust estate<sup>5</sup>.

The rule applied even where the trustee acted as a solicitor or in some other professional capacity<sup>6</sup>, and extended to the professional trustee's firm and his individual partners unless the partner employed was alone entitled to the remuneration<sup>7</sup>; and it extended to a trade or business for the benefit of the trust<sup>8</sup>. It did not, however, apply to the costs of a solicitor-trustee acting in legal proceedings for himself and his co-trustees jointly, or for himself and his beneficiary<sup>9</sup>.

Where the equitable rules apply, the court will exercise its jurisdiction to grant remuneration to trustees only sparingly and in exceptional cases<sup>10</sup>.

1 See PARA 860 post.

2 As to express declarations as to the remuneration of professional trustees see TRUSTS vol 48 (2007 Reissue) PARAS 934-935. Where the court appoints a corporation to be a trustee, either solely or jointly with another person, the court may authorise the corporation to charge such remuneration for its services as trustee as the court may think fit: Trustee Act 1925 s 42. As to fees charged by the Public Trustee see TRUSTS vol 48 (2007 Reissue) PARAS 790-791.

3 *Robinson v Pett* (1734) 3 P Wms 249 at 251; and see *Moore v Frowd* (1837) 3 My & Cr 45 at 50 per Lord Cottenham LC. The rule applied where trustees were directors of a company in respect of shares belonging to the trust (*Re Francis, Barrett v Fisher* (1905) 74 LJ Ch 198), but not where a director represented the company as director of another company, shares being transferred to him as his qualification (*Re Dover Coalfield Extension Ltd* [1908] 1 Ch 65, CA). Where a trustee has acquired a position in respect of which he draws remuneration by virtue of his position as trustee, he will not be entitled to retain the remuneration: *Re Macadam, Dallow v Codd* [1946] Ch 73, [1945] 2 All ER 664 (trustee becoming company director by exercising a discretionary power); cf *Re Dover Coalfield Extension Ltd* supra. As to accountability see also *Re Gee, Wood v Staples* [1948] Ch 284, [1948] 1 All ER 498; *Re Brooke Bond & Co Ltd's Trust Deed, Brooke v Brooke Bond & Co Ltd* [1963] Ch 357, [1963] 1 All ER 454 (custodian trustee); and see *Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721, HL.

4 *A-G v Norwich Corpn* (1837) 2 My & Cr 406 at 424.

5 *Re Exhall Coal Co Ltd, Re Bleckley* (1866) 35 Beav 449; and see TRUSTS vol 48 (2007 Reissue) PARA 904 et seq.

6 *Re Worthington, ex p Leighton v Macleod* [1954] 1 All ER 677, [1954] 1 WLR 526.

7 *Re Gates, Arnold v Gates* [1933] Ch 913. As to a solicitor-trustee's remuneration clause see *Re Fish, Bennett v Bennett* [1893] 2 Ch 413, CA; *Re Chalinder and Herington* [1907] 1 Ch 58; and see *Re Gates, Arnold v Gates* supra; *Re Hill, Claremont v Hill* [1934] Ch 623, CA; *Re Worthington, ex p Leighton v Macleod* [1954] 1 All ER 677, [1954] 1 WLR 526; and LEGAL PROFESSIONS vol 66 (2009) PARA 811. As to a bank-trustee's charging clause see *Re Waterman's Will Trusts, Lloyds Bank v Sutton* [1952] 2 All ER 1054; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 817.

8 See TRUSTS vol 48 (2007 Reissue) PARAS 934-935.

9 *Cradock v Piper* (1850) 1 Mac & G 664; and see *Re Doody, Fisher v Doody* [1893] 1 Ch 129, CA.

10 *Re Worthington, ex p Leighton v Macleod* [1954] 1 All ER 677, [1954] 1 WLR 526; *Re Barbour's Settlement, National Westminster Bank Ltd v Barbour* [1974] 1 All ER 1188 at 1192, [1974] 1 WLR 1198 at 1203 per Megarry J; *Re Duke of Norfolk's Settlement Trusts, Earl of Perth v Fitzalan-Howard* [1982] Ch 61, [1981] 3 All ER 220, CA. These authorities must now be read in the light of para 860 post.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/6. EQUITABLE RELIEF IN CASES OF FIDUCIARY RELATIONSHIP/(1) TRUSTEES AND OTHER PERSONS IN FIDUCIARY POSITIONS/860. Professional trustees; statutory modification of the equitable rules.

## **860. Professional trustees; statutory modification of the equitable rules.**

The Trustee Act 2000<sup>1</sup> has introduced new rules for the construction of express charging clauses where the trustee is a trust corporation or is acting in a professional capacity<sup>2</sup>, except to the extent to which the trust instrument makes inconsistent provision<sup>3</sup>. The trustee is now to be treated as entitled under the trust instrument to receive payment in respect of services even if they are services which are capable of being provided by a lay trustee<sup>4</sup>. Further, any payments to which a trustee is entitled in respect of services are to be treated<sup>5</sup> as remuneration for services and not as a gift<sup>6</sup>.

The Trustee Act 2000 also contains new provisions<sup>7</sup> which apply where there is no provision, either for or against, about the entitlement of a trustee to remuneration in the trust instrument or in any enactment or any provision of subordinate legislation<sup>8</sup>. A trustee who is a trust corporation but is not a trustee of a charitable trust is entitled to receive reasonable remuneration<sup>9</sup> out of trust funds<sup>10</sup> for any services that the trust corporation provides to or on behalf of the trust<sup>11</sup>. A trustee who acts in a professional capacity<sup>12</sup>, but is not a trust corporation, a trustee of a charitable trust or a sole trustee, is likewise entitled provided that each other trustee has agreed in writing that he may be remunerated for the service<sup>13</sup>. A trustee is thus entitled to remuneration even if the services in question are capable of being provided by a lay trustee<sup>14</sup>.

The provisions described above are discussed in more detail elsewhere in this work<sup>15</sup>.

1 See the Trustee Act 2000 s 28; and TRUSTS vol 48 (2007 Reissue) PARA 931.

2 As to when a trustee acts in a professional capacity for these purposes see *ibid* ss 28(5), 39(2); and TRUSTS vol 48 (2007 Reissue) PARA 931.

3 See *ibid* s 28(1). As to the application of s 28 to a trustee of a charitable trust who is not a trust corporation see s 28(3).

4 *Ibid* s 28(2). As to when a person acts as a lay trustee for these purposes see s 28(6).

5 *Ie* for the purposes of the Wills Act 1837 s 15 (as amended) (gifts to an attesting witness to be void) and of the Administration of Estates Act 1925 s 34(3) (order in which estate to be paid out): see EXECUTORS AND ADMINISTRATORS; WILLS.

6 Trustee Act 2000 s 28(4).

7 See *ibid* s 29; and TRUSTS vol 48 (2007 Reissue) PARA 932.

8 *Ibid* s 29(5).

9 For the meaning of 'reasonable remuneration' for these purposes see *ibid* s 29(3); and TRUSTS vol 48 (2007 Reissue) PARA 932.

10 *Ie* out of the income or capital funds of the trust: see *ibid* s 39(1).

11 *Ibid* s 29(1).

12 See note 2 *supra*.

13 Trustee Act 2000 s 29(2).



- 14 Ibid s 29(4). For the meaning of 'lay trustee' for these purposes see ss 28(6), 39(2).
- 15 See TRUSTS vol 48 (2007 Reissue) PARAS 931-932.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/6. EQUITABLE RELIEF IN CASES OF FIDUCIARY RELATIONSHIP/(2) FOLLOWING AND TRACING ASSETS/861. Trust property may be followed and traced.

## **(2) FOLLOWING AND TRACING ASSETS**

### **861. Trust property may be followed and traced.**

In certain cases, for example between a beneficiary and a trustee and persons claiming under the trustee, trust money or other property, or the money or other property into which it has been converted, may, so far as it is capable of being identified<sup>1</sup> or disentangled<sup>2</sup>, be followed or traced and recovered<sup>3</sup>. Trust property may not, however, be followed into the hands of a purchaser for valuable consideration without notice of the trust<sup>4</sup>; in such a case the claim of the beneficiary is extinguished<sup>5</sup>. The beneficiary may, however, be able to trace his equitable interest into the proceeds.

Following and tracing are both exercises in locating assets which are or may be taken to represent an asset belonging to the claimants and to which they assert equitable ownership. The processes of following and tracing are, however, distinct. Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as a substitute for the old<sup>6</sup>. One set of facts may involve both following and tracing. The processes enable a claimant to substitute the traceable proceeds for the original asset as the subject of his claim. The transmission of a claimant's property rights from one asset to its traceable proceeds is part of the law of property, not of the law of unjust enrichment. There is no 'unjust factor' to justify restitution and the claimant succeeds if at all by virtue of his own title, not to reverse unjust enrichment. Property rights are determined by fixed rules and settled principles; they are not discretionary, nor do they depend upon ideas of what is fair, just and reasonable<sup>7</sup>.

The principle of following assets applies wherever a fiduciary relation between the parties subsists<sup>8</sup>, and extends to enable property to be recovered from anyone who acquires a legal title in breach of some trust, express or constructive, or of some other fiduciary obligation, including an innocent volunteer into whose hands the legal title to the property has come, provided that, as a result of what has gone before, some equitable interest had attached to the property in the hands of the volunteer<sup>9</sup>.

The wide meaning given to fiduciary relationship may have important repercussions in commercial transactions for, if an appropriate reservation of title clause is incorporated into a contract of sale, not only may the property sold remain the property of the vendor until he has been fully paid, but on a sub-sale the head vendor may be able to trace the proceeds of sale and recover them in priority to other creditors<sup>10</sup>.

Stolen moneys are traceable in equity on the ground that when property is obtained by fraud, equity imposes a constructive trust on the fraudulent recipient<sup>11</sup>. It has been held that a person who pays money to another under a factual mistake retains an equitable property in it and the conscience of that other is subjected to a fiduciary duty to respect his proprietary right<sup>12</sup>. However, it is submitted that the better view is that a recipient of money under a contract subsequently found to be void for mistake or as being ultra vires does not hold the money on a resulting trust; in these cases the transferor intended that the whole legal and beneficial ownership should pass to the transferee<sup>13</sup>. It is a different matter where a transfer of property to an agent of the transferor was obtained by fraudulent misrepresentation and the transferor never intended that the whole legal and beneficial interest should pass to the transferee<sup>14</sup>.

Where a trustee wrongfully misappropriates trust property and uses it exclusively to acquire other property for his own benefit, the beneficiary is entitled at his option either to assert his beneficial ownership of the proceeds or to bring a personal claim against the trustee for breach of trust and enforce an equitable lien or charge on the proceeds to secure restoration of the trust fund. Both remedies are proprietary and depend on successfully tracing the trust property into its proceeds; they can be maintained against the wrongdoer and anyone who derives title from him except a bona fide purchaser for value without notice of the breach of trust. If the beneficiary is unable to trace the trust property into its proceeds, he still has a personal claim against the trustee, but his claim will be unsecured<sup>15</sup>.

The means which equity adopted where the property was traced into a mixed fund was the declaration of charge which was not available at common law<sup>16</sup>. Hence, if property has been sold, whether rightfully or wrongfully, the true owner may follow the property into the proceeds of sale if he can identify them or the fund in which they are mixed and obtain relief out of that fund. There is no distinction between a rightful and wrongful disposition of the property as regards the owner's right to follow the proceeds<sup>17</sup>. If the proceeds have been invested, without the addition of further money, in the purchase of other property, the beneficial owner has the right to elect either to take the property purchased<sup>18</sup> or to have a charge on it for the amount of the trust money<sup>19</sup>. The trust property may be followed by a trustee who has been concerned in the breach of trust<sup>20</sup>.

There is nothing illegitimate in invoking the two doctrines of tracing and subrogation<sup>21</sup> in the same case<sup>22</sup>.

1 *Re Mawson, ex p Hardcastle* (1881) 44 LT 523; *Re Hallett & Co, ex p Blane* [1894] 2 QB 237, CA; *Agip (Africa) Ltd v Jackson* [1990] Ch 265, [1992] 4 All ER 385; affd [1991] Ch 547, [1992] 4 All ER 451, CA.

2 *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 537, [1948] 2 All ER 318 at 355, CA; affd, although not expressly on this point, sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] AC 251, [1950] 2 All ER 1137, HL.

3 The leading case is *Foskett v McKeown* [2001] 1 AC 102, [2000] 3 All ER 97, HL. Older authorities include *Whitecomb v Jacob* (1710) 1 Salk 160; *Mansell v Mansell* (1732) 2 P Wms 678; *Taylor v Plumer* (1815) 3 M & S 562; *Robertson v Morrice* (1845) 4 LTOS 430; *Pannell v Hurley* (1845) 2 Coll 241; *Murray v Pinkett* (1846) 12 Cl & Fin 764, HL; *Mant v Leith* (1852) 15 Beav 524; *Pennell v Deffell* (1853) 4 De GM & G 372; *Ernest v Croysdill* (1860) 2 De GF & J 175; *Frith v Cartland* (1865) 2 Hem & M 417; *Boursot v Savage* (1866) LR 2 Eq 134; *Re Anslow, ex p Barber* (1880) 42 LT 411; *Carson v Sloane* (1884) 13 LR Ir 139; *Gibert v Gonard* (1884) 54 LJ Ch 439; *Re Murray, Dickson v Murray* (1887) 57 LT 223; *Patten v Bond* (1889) 60 LT 583; *Crichton v Crichton* [1895] 2 Ch 853 at 858 (on appeal [1896] 1 Ch 870, CA); *Pullan v Koe* [1913] 1 Ch 9; *Re Clasper Group Services Ltd* [1989] BCLC 143. Trust money can be followed into land: *Lane v Dighton* (1762) Amb 409; *Lench v Lench* (1805) 10 Ves 511 at 517 per Grant MR. In *Grant v Callaghan* (1956) 107 L Jo 105 a wife's money which had been used in the purchase of a medical practice for her husband was traced into the compensation paid under the National Health Service Act 1946 s 36 (repealed) for the loss of the goodwill of the practice. If the property has not changed its character, it may be recoverable at law without resorting to the equitable rule: *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321, CA. See also *Nelson v Larholt* [1948] 1 KB 339 at 343, [1947] 2 All ER 751 at 752 per Denning J; *GL Baker Ltd v Medway Building and Supplies Ltd* [1958] 2 All ER 532, [1958] 1 WLR 1216 (new trial ordered [1958] 3 All ER 540, [1958] 1 WLR 1216 at 1225, CA; leave to appeal refused [1959] 1 WLR 492, HL). Property may be followed into the hands of a person who acquires it from an executor de son tort with notice of a trust: *Hill v Curtis* (1865) LR 1 Eq 90. The equitable doctrine of tracing is distinct from the imposition of a constructive trust: *Re Montagu's Settlement Trusts, Duke of Manchester v National Westminster Bank Ltd* [1987] Ch 264, [1992] 4 All ER 308.

4 *A-G v Gower* (1736) 2 Eq Cas Abr 685; *Carter v Carter* (1857) 3 K & J 617; *Thorndike v Hunt, Browne v Butter* (1859) 3 De G & J 563; *Case v James* (1861) 3 De GF & J 256 at 266; *Dodds v Hills* (1865) 2 Hem & M 424; *Cave v Cave* (1880) 15 ChD 639; *Taylor v Blakelock* (1886) 32 ChD 560, CA; *Edgar v Plomley* [1900] AC 431, PC. 'Notice', it was pointed out by Megarry VC in *Re Montagu's Settlement Trusts* [1987] Ch 264 at 277, [1992] 4 All ER 308 at 322-323, is not the same thing as knowledge and where commercial transactions are concerned, knowledge, actual or constructive, has to be shown to make a purchaser liable to the equitable tracing remedy: *Polly Peck International plc v Nadir (No 2)* [1992] 4 All ER 769 at 781-782, [1992] 2 Lloyd's Rep 238 at 246-247, CA, per Scott LJ. See also *Eagle Trust plc v SBC Securities Ltd* [1992] 4 All ER 488 at 497-498, [1993] 1 WLR 484 at 494 (the order made in that case was set aside in the Court of Appeal and the plaintiff was given liberty to amend the writ and statement of claim: [1993] 1 WLR 508n).

5 *Re Diplock, Diplock v Wintle*[1948] Ch 465 at 539, [1948] 2 All ER 318 at 356, CA; and see *GL Baker Ltd v Medway Building and Supplies Ltd*[1958] 2 All ER 532, [1958] 1 WLR 1216 (where the purchaser failed to plead valuable consideration and elected to amend on appeal [1958] 3 All ER 540, [1958] 1 WLR 1216 at 1225, CA). Property cannot be recovered once it has passed as money or as a negotiable instrument without notice of the trust (*Re Julian, ex p Dumas* (1754) 2 Ves Sen 582 at 585-586; *Dawson v Prince* (1857) 2 De G & J 41; *Union Bank of Australia v Murray-Aynsley*[1898] AC 693, PC), but this limitation does not prevent money which has passed into a banking account of a person not standing in the fiduciary relation being subject to the equity (*Re Diplock, Diplock v Wintle* supra at 536-538 and at 354-355; affd, although not expressly on this point, sub nom *Ministry of Health v Simpson*[1951] AC 251, [1950] 2 All ER 1137, HL).

6 *Foskett v McKeown*[2001] 1 AC 102 at 127, [2000] 3 All ER 97 at 119, HL, per Lord Millett. The distinction is not always made: see Underhill and Hayton *Law of Trusts and Trustees* (16th Edn, 2002) p 983 et seq.

7 *Foskett v McKeown*[2001] 1 AC 102 at 127, [2000] 3 All ER 97 at 119-120, HL, per Lord Millett; but see dicta of the same judge in *Boscawen v Bajwa, Abbey National plc v Boscawen*[1995] 4 All ER 769 at 776, [1996] 1 WLR 328 at 334, CA.

8 *Re Julian, ex p Dumas* (1754) 2 Ves v Sen 582; *Buckeridge v Glasse* (1841) Cr & Ph 126; *Frith v Cartland* (1865) 2 Hem & M 417; *Hopper v Conyers*(1866) LR 2 Eq 549; *Re Hallett's Estate, Knatchbull v Hallett*(1880) 13 ChD 696 at 709, CA, per Jessel MR, overruling *Re West of England and South Wales District Bank, ex p Dale & Co*(1879) 11 ChD 772; *New Zealand and Australian Land Co v Watson*(1881) 7 QBD 374 at 383-384, CA; *Harris v Truman*(1882) 9 QBD 264, CA; *Comité des Assureurs Maritimes v Standard Bank of South Africa* (1883) Cab & El 87; *Marten v Rocke, Eyton & Co* (1885) 53 LT 946 at 948; *Hancock v Smith*(1889) 41 ChD 456, CA; *Sinclair v Brougham*[1914] AC 398 at 441-442, HL, per Lord Parker (but see *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[1996] AC 669, [1996] 2 All ER 961, HL, where *Sinclair v Brougham* supra was not followed); *Re Dacre, Whitaker v Dacre*[1915] 2 Ch 480 (affd [1916] 1 Ch 344, CA); *Grant v Callaghan* (1956) 107 L Jo 105; *GL Baker Ltd v Medway Building and Supplies Ltd*[1958] 2 All ER 532, [1958] 1 WLR 1216 (on appeal [1958] 3 All ER 540, [1958] 1 WLR 1216 at 1225); *Agip (Africa) Ltd v Jackson*[1990] Ch 265, [1992] 4 All ER 385; affd [1991] Ch 547, [1992] All ER 451, CA; *Boscawen v Bajwa, Abbey National plc v Boscawen*[1995] 4 All ER 769, [1996] 1 WLR 328, CA.

A client's money may be followed into the assets of a stockbroker, since he is an agent into whose hands the money is put to be applied in a particular way: *Taylor v Plumer* (1815) 3 M & S 562; *Re Strachan, ex p Cooke*(1876) 4 ChD 123, CA; and see *Re Chaplin, Milne, Grenfell & Co Ltd* (1914) 59 Sol Jo 250. Although the relation of banker and customer is in general that of debtor and creditor, yet, where a cheque is handed to a bank to collect and hold the proceeds for the customer, this is a trust and the money may be followed: *Re Brown, ex p Plitt* (1889) 60 LT 397.

9 *Sinclair v Brougham*[1914] AC 398, HL, as explained in *Re Diplock, Diplock v Wintle*[1948] Ch 465 at 530-532, [1948] 2 All ER 318 at 352-353, CA; affd sub nom *Ministry of Health v Simpson*[1951] AC 251, [1950] 2 All ER 1137, HL. The criticism of *Sinclair v Brougham* supra in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[1996] AC 669, [1996] 2 All ER 961, HL, does not seem to affect this point. The proposition in the text is supported by *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105, [1979] 3 All ER 1025; *Agip (Africa) Ltd v Jackson*[1991] Ch 547, [1992] 4 All ER 951, CA; *El Ajou v Dollar Land Holdings plc*[1993] 3 All ER 717, [1993] BCLC 735 (revsd on other grounds [1994] 2 All ER 685, [1994] 1 BCLC 461, CA). It is, however, perhaps doubtful whether the requirement of a pre-existing fiduciary relationship would survive an appeal to the House of Lords: see *Foskett v McKeown*[2001] 1 AC 102 at 128, [2000] 3 All ER 97 at 121, HL, per Lord Millett; *Bank of Scotland v A Ltd*[2001] EWCA Civ 52 at [30], [2001] 3 All ER 58, [2001] 1 WLR 751 per Lord Woolf. Indeed in *Bracken Partners Ltd v Gutteridge*[2003] EWHC 1064 (Ch), [2003] 2 BCLC 84, [2003] All ER (D) 455 (Mar), Peter Leaver QC (sitting as a deputy judge of the High Court), while finding that there was a trust, appears to have considered that if he were wrong on that the same result could be reached on the basis of dicta in *Foskett v McKeown* supra to the effect that there is no logical justification for requiring a pre-existing fiduciary relationship in order for tracing to be permitted. However in *Shalson v Russo*[2003] EWHC 1637 (Ch), [2003] 35 LS Gaz R 37, [2003] All ER (D) 209 (Jul), Rimer J said that he did not regard these dicta as deciding that there was no longer a need to identify a pre-existing fiduciary relationship.

10 See *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd*[1976] 2 All ER 552, [1976] 1 WLR 676, CA; *Clough Mill Ltd v Martin*[1984] 3 All ER 982, [1985] 1 WLR 111, CA; *Armour v Thyssen Edelstahlwerke AG*[1991] 2 AC 339, [1990] 3 All ER 481, HL; *Re Bond Worth Ltd*[1980] Ch 228, [1979] 3 All ER 919; *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25, [1979] 3 All ER 961, CA; *Re Andrabell Ltd v (in liq), Airborne Accessories Ltd v Goodman* [1984] 3 All ER 407; *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 2 All ER 152, [1984] 1 WLR 485; *E Pfeiffer Weinkellerei-Weineinkaufsgesellschaft mbH & Co v Arbuthnot Factors Ltd* [1988] 1 WLR 150. See also *Four Point Garage Ltd v Carter*[1985] 3 All ER 12; *Re Peachdart Ltd* [1984] Ch 131, [1983] 3 All ER 204; *Tatung (UK) Ltd v Galex Telesure Ltd* (1988) 5 BCC 325; *Re Highway Foods International Ltd (in administrative receivership), Mills v C Harris (Wholesale Meat) Ltd* [1995] 1 BCLC 209, [1995] BCC 271; and *Chaigley Farms Ltd v Crawford, Kaye & Grayshire Ltd (t/a Leylands)* [1996] BCC 957.

11 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[1996] AC 669, [1996] 2 All ER 961, HL; *Lipkin Gorman v Karpnale Ltd*[1991] 2 AC 548, [1992] 4 All ER 512, HL. See also *El Ajou v Dollar Land*

*Holdings plc*[1993] 3 All ER 717, [1993] BCLC 735 (revsd on other grounds [1994] 2 All ER 685, [1994] 1 BCLC 461, CA).

12 *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105, [1979] 3 All ER 1025. The reasoning in this case, is, in the light of the decision in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[1996] AC 669, [1996] 2 All ER 961, HL, 'at best doubtful' (see *Hillsdown Holdings plc v Pensions Ombudsman*[1997] 1 All ER 862 at 904 per Knox J), although the actual decision may be supported on the ground that the retention of the moneys after the recipient bank learned of the mistake gave rise to a constructive trust.

13 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[1996] AC 669, [1996] 2 All ER 961, HL; *Hillsdown Holdings plc v Pensions Ombudsman*[1997] 1 All ER 862, [1996] PLR 427. See also *Bankers Trust Co v Shapira*[1980] 3 All ER 353, [1980] 1 WLR 1274, CA. As to the partial abolition of the doctrine of ultra vires see PARA 774 ante.

14 *Collings v Lee*[2001] 2 All ER 332, 82 P & CR 27, CA.

15 *Foskett v McKeown*[2001] 1 AC 102, [2000] 3 All ER 97, HL.

16 *Re Diplock, Diplock v Wintle*[1948] Ch 465 at 521, 534, [1948] 2 All ER 318 at 346, 353-354, CA; affd, although not expressly on this point, sub nom *Ministry of Health v Simpson*[1951] AC 251, [1950] 2 All ER 1137, HL.

17 *Re Hallett's Estate, Knatchbull v Hallett*(1880) 13 ChD 696 at 709, CA, per Jessel MR; *Madras Official Assignee v Krishanaji Bhat* (1933) 49 TLR 432 at 433, PC.

18 In the instance of payment of money into a bank account, a chose in action (the bank's debt to the customer) is substituted for the money; and, if there has been no admixture of other money, the appropriate relief is a specific order for restoration (see *Re Diplock, Diplock v Wintle*[1948] Ch 465 at 522, [1948] 2 All ER 318 at 347, CA; affd, although not expressly on this point, sub nom *Ministry of Health v Simpson*[1951] AC 251, [1950] 2 All ER 1137, HL; *Re Nanwa Gold Mines Ltd, Ballantyne v Nanwa Gold Mines Ltd*[1955] 3 All ER 219, [1955] 1 WLR 1080 (where subscribers to an issue of new shares were held entitled to an equity or lien on application money kept in a separate account on the failure of specified conditions: see LIEN vol 68 (2008) PARA 856)); but, if a mixed fund has been created, the appropriate remedy is by declaration of charge.

19 *Re Hallett's Estate, Knatchbull v Hallett*(1880) 13 ChD 696 at 709, CA, per Jessel MR.

20 *Brooksbank v Smith* (1836) 2 Y & C Ex 58; *Price v Blakemore* (1843) 6 Beav 507; *Carson v Sloane* (1884) 13 LR Ir 139.

21 As to subrogation see PARA 770 et seq ante.

22 *Boscawen v Bajwa, Abbey National plc v Boscawen*[1995] 4 All ER 769, [1996] 1 WLR 328, CA.

## UPDATE

### 861 Trust property may be followed and traced

NOTE 3--See *Clark v Cutland*[2003] EWCA Civ 810, [2004] 1 WLR 783 (appropriate to trace company funds into pension fund assets where unauthorised payments made by director).

NOTE 9--*Shalson*, cited, reported at [2005] Ch 281.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/6. EQUITABLE RELIEF IN CASES OF FIDUCIARY RELATIONSHIP/(2) FOLLOWING AND TRACING ASSETS/862. Identification.

## 862. Identification.

Tracing is only possible so long as the fund can be followed in a true sense, that is, so long as, whether mixed or unmixed, it can be located and identified. It presupposes the continued existence of the money either as a separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund. If, on the facts of any individual case, such continued existence is not established, equity is as helpless as the common law itself<sup>1</sup>. Where trust money is used in the alteration and improvement of property which the defendant already owns, it has been said<sup>2</sup> that this would not necessarily increase its value, in which case the money would have disappeared leaving no monetary trace behind. More recently the view has been expressed that where the value of the defendant's land has been enhanced by the use of the claimant's money the court may treat the land as charged with the payment to the claimant of a sum representing that increase in value<sup>3</sup>; the most however that a claimant can hope for is a proprietary lien to recover the money expended<sup>4</sup>.

Again, there are dicta<sup>5</sup> which appear to hold that the right to trace comes to an end if an innocent volunteer uses the trust money to pay off a debt, even though secured, and even though the money was given to him for this purpose. The effect of such payment was said to be that the debt is extinguished and any security ceases to exist, and the beneficiary under the trust cannot claim to be subrogated to the rights of the creditor. More recently the view has been expressed<sup>6</sup> that there is no reason why in the case of a secured debt subrogation should not be available.

An innocent volunteer who has received trust property cannot be made subject to a personal liability to account for it as a constructive trustee if he has parted with it without having previously acquired some knowledge of the existence of the trust<sup>7</sup>.

1 See *Re Diplock, Diplock v Wintle* [1948] Ch 465, [1948] 2 All ER 318, CA; affd on a different ground sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL (tracing impossible where money spent on a dinner or on education or general living expenses); *Boscawen v Bajwa, Abbey National plc v Boscawen* [1995] 4 All ER 769, [1996] 1 WLR 328, CA; *Shalson v Russo* [2003] EWHC 1637 (Ch), [2003] All ER (D) 209 (Jul).

2 See *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 547, [1948] 2 All ER 318 at 361, CA; affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL.

3 *Boscawen v Bajwa, Abbey National plc v Boscawen* [1995] 4 All ER 769 at 777, [1996] 1 WLR 328 at 335, CA, per Millett LJ.

4 See *Foskett v McKeown* [2001] 1 AC 102 at 109, [2000] 3 All ER 97 at 102, HL, per Lord Browne-Wilkinson. In some cases the claimant will be entitled to no proprietary interest at all if to give such interest would be unfair: *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 548, [1948] 2 All ER 318 at 361, CA; affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL.

5 See note 2 supra.

6 See *Boscawen v Bajwa, Abbey National plc v Boscawen* [1995] 4 All ER 769 at 780 et seq, [1996] 1 WLR 328 at 338 et seq, CA, per Millett LJ, who explained *Re Diplock, Diplock v Wintle* [1948] Ch 465, [1948] 2 All ER 318, CA (affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL) as a case where in the particular circumstances it was considered unjust to grant the remedy of subrogation; those circumstances would today, he said, be regarded as relevant to a change of position defence rather than as going to liability.

7     *Re Montagu's Settlement Trusts* [1987] Ch 264, [1992] 4 All ER 308; *Agip (Africa) Ltd v Jackson* [1990] Ch 265 at 290, [1992] 4 All ER 385 at 403 per Millett J (affd [1991] Ch 547, [1992] 4 All ER 951, CA); *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961, HL.

## **UPDATE**

### **862 Identification**

NOTE 1--*Shalson*, cited, reported at [2005] Ch 281.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/6. EQUITABLE RELIEF IN CASES OF FIDUCIARY RELATIONSHIP/(2) FOLLOWING AND TRACING ASSETS/863. Mixture of trust property with the trustee's own property.

### **863. Mixture of trust property with the trustee's own property.**

Equity finds no difficulty in regarding a composite fund as an amalgam constituted by the mixture of two or more funds each of which may be regarded as having, for certain purposes, a continuous separate existence; in other words the amalgam is capable, in proper circumstances, of being resolved into its component parts<sup>1</sup>. Accordingly where a trustee<sup>2</sup> or fiduciary agent wrongfully uses trust money to provide part of the costs of acquiring an asset, the beneficiary is entitled at his option either to claim a proportionate share of the asset or to enforce a lien upon it to secure his personal claim against the trustee for the amount of the misapplied money. It does not matter whether the trustee mixed the trust money with his own in a single fund before using it to acquire the asset or made separate payments, whether simultaneously or sequentially, out of the differently owned funds to acquire a single asset<sup>3</sup>. It is not necessary for the beneficiary to show in addition that his property has contributed to any increase in the value of the new asset<sup>4</sup>. Similar principles apply where a person taking the beneficial owner's money from the person in a fiduciary relationship, with notice that it is money held in a fiduciary capacity, proceeds to mix it with money of his own<sup>5</sup>. The rule also applies if an innocent volunteer mixes money of his own with property received from a fiduciary agent or in which equitable interests subsist, there being no difference in principle whether the mixing is done by the volunteer or whether it has been previously done by the fiduciary agent<sup>6</sup>; the volunteer must admit the true owner's claim, but is not precluded from setting up his own claim in respect of the money of his own which has been contributed to the mixed fund with the result that they share on an equal footing<sup>7</sup>.

Where a trustee in breach of trust has mixed trust money with money in his own bank account, the moneys in the account belong to the trustee personally and to the beneficiaries under the trust rateably according to the amounts respectively provided. On a proper analysis there are no 'moneys in the account' in the sense of physical cash. Immediately before the improper mixture, the trustee had a chose in action being his right against the bank to demand payment of the credit balance in the account. Immediately after the mixture, the trustee had the same chose in action but its value reflected in part the amount of the beneficiaries' money wrongfully paid in. The credit balance on the account belongs to the trustee and the beneficiaries rateably according to their respective contributions<sup>8</sup>.

Where, as is commonly the case, the mixing takes place in an active banking account, under the rule in the *Hallett's Estate* case<sup>9</sup> the trustee is presumed to draw out his own moneys first, and is deemed not to draw on the trust moneys until his own moneys have been exhausted, no matter in what order the moneys were paid in. Tracing is only possible to such an amount of the balance ultimately standing to the credit of the trustee as does not exceed the lowest intermediate balance standing to the credit of the account after the date of the mixing and before the date when the claim is made<sup>10</sup>. It cannot be pursued through an overdrawn account, whether overdrawn at the time the money was paid into the account or subsequently. It is only possible to trace in equity money which has a continued existence, actual or notional; likewise there can be no equitable remedy against an asset acquired out of the relevant bank account before the misappropriation took place<sup>11</sup>.

The rule described above<sup>12</sup> does not derogate from the principle that the beneficiary is entitled to a first charge on the mixed fund or any property which is purchased out of that fund<sup>13</sup>. Since equity treats money in a mixed account as charged with the repayment of the beneficiary's



money, if it is paid into a number of different accounts the beneficiary can claim a similar charge over each of the recipient accounts. He is not bound to choose between them<sup>14</sup>. It seems, however, that a charge will not be granted when to do so would work an injustice<sup>15</sup>.

1 *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 520, [1948] 2 All ER 318 at 346, CA; affd, although not expressly on this point, sub nom *Ministry of Health v Simpson* [1951] AC 251, [1951] 2 All ER 1137, HL.

2 'Trustee', where the context so admits, includes other fiduciary agents: see *A-G for Hong Kong v Reid* [1994] 1 AC 324, [1994] 1 All ER 1, PC; and PARA 858 ante.

3 *Foskett v McKeown* [2001] 1 AC 102 [2000] 3 All ER 97, HL, where it was stated that similar principles apply to following into physical mixtures, citing *Lupton v White, White v Lupton* (1808) 15 Ves 432; *Sandeman & Sons v Tyzack and Branfoot Steamship Co Ltd* [1913] AC 680; *Jones v De Marchant* (196) 28 DLR 561; *Firth v Cartland* (1993) 2 Hem & M 417 (see *Foskett v McKeown* supra at 132-133 and at 124-125 per Lord Millett). See also *Re Tilley's Will Trusts, Burgin v Croad* [1967] Ch 1179 at 1189, 1193, [1967] 2 All ER 303 at 310, 313 (where, however, the beneficiary was held not to be entitled to a proportion of the property acquired as trust money had not facilitated its purchase).

4 *Foskett v McKeown* [2001] 1 AC 102, [2000] 3 All ER 97, HL, where the principles set out in the text were held to apply to the proceeds of a life assurance policy on the life of a trustee in circumstances where the trustee used trust money to pay some of the premiums on the policy. The trustee had declared himself a trustee of the policy but the volunteer beneficiaries under this trust could not be in a better position than the trustee.

5 *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 539, [1948] 2 All ER 318 at 356, CA; affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL.

6 *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 534, [1948] 2 All ER 318 at 354, CA; affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1951] 2 All ER 1137, HL.

7 *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 550, [1948] 2 All ER 318 at 362-363, CA; affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL.

8 See *Foskett v McKeown* [2001] 1 AC 102 at 110, [2000] 3 All ER 97 at 103, HL, per Lord Browne-Wilkinson.

9 See the rule in *Re Hallett's Estate, Knatchbull v Hallett* (1880) 13 ChD 696, CA.

10 *James Roscoe (Bolton) Ltd v Winder* [1915] 1 Ch 62.

11 *Bishopsgate Investment Management Ltd (in liq) v Homan* [1995] Ch 211, [1995] 1 All ER 347, CA.

12 See note 9 supra.

13 *Re Oatway* [1903] 2 Ch 356; and see *Boscawen v Bajwa, Abbey National plc v Boscawen* [1995] 4 All ER 769, [1996] 1 WLR 328, CA. See also *Pennell v Deffell* (1853) 4 De GM & G 372; *Harford v Lloyd* (1855) 20 Beav 310; *Birt v Burt* (1877) 11 ChD 773n, CA; *Re Hallett's Estate, Knatchbull v Hallett* (1880) 13 ChD 696 at 709, CA, per Jessel MR; *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 539, [1948] 2 All ER 318 at 356, CA; affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL; *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 3 All ER 75, [1986] 1 WLR 1072, PC. Similar principles apply to other fungibles: see *Indian Oil Corp Ltd v Greenstone Shipping SA (Panama)* [1988] QB 345; sub nom *Indian Oil Corp Ltd v Greenstone Shipping SA, The Ypatianna* [1987] 3 All ER 893; *Glencore International AG v Metro Trading Inc* [2001] 1 All ER (Comm) 103, [2001] 1 Lloyd's Rep 284. 'Equity's power to charge a mixed fund with the repayment of trust moneys ... enables the claimants to follow the money, not because it is theirs, but because it is derived from a fund which is treated as if it were subject to a charge in their favour': *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 at 736, [1993] BCLC 735 at 754 per Millett J (revsd on a different ground [1994] 2 All ER 685, [1994] 1 BCLC 464, CA). See also *El Ajou v Dollar Land Holdings plc (No 2)* [1995] 2 All ER 213.

14 *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717, [1993] BCLC 735; revsd on a company law point [1994] 2 All ER 685, [1994] 1 BCLC 464, CA.

15 *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 548, [1948] 2 All ER 318 at 361, CA; affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/6. EQUITABLE RELIEF IN CASES OF FIDUCIARY RELATIONSHIP/(2) FOLLOWING AND TRACING ASSETS/864. Mixing of two trust funds, or of trust moneys with moneys of an innocent volunteer.

### **864. Mixing of two trust funds, or of trust moneys with moneys of an innocent volunteer.**

Where the contest is between two claimants to a mixed fund made up of moneys held on behalf of the two of them respectively and mixed together by the trustee, they share on an equal footing, and if property is acquired by means of the mixed fund, each is entitled to a charge *pari passu* and neither is entitled to priority over the other<sup>1</sup>. Further, as against the trustee, they can agree to take the property itself so as to become tenants in common in shares proportional to the amounts for which either could claim a charge<sup>2</sup>.

These rules are modified where the mixing takes place in an active banking account, where there is one unbroken account. As between two beneficiaries of the same trustee under different trusts, however, the rule, known as the rule in *Clayton's Case*<sup>3</sup>, applies with respect to trust funds which the trustee has paid into his own account, so that the sum first paid in is held to have been first drawn out<sup>4</sup>. The same principle applies when the claimants are a beneficiary and a volunteer<sup>5</sup>, although, if a volunteer who has mixed trust money with his own subsequently unmixes it, equity will not disregard this, and will not allow a person who, for his own purposes, has ear-marked the trust money to assert that what he has ear-marked is not trust money but money which he is entitled to keep as his own<sup>6</sup>.

When, after applying the rule, it appears that part of the trust money has been drawn out, only the balance may be followed, notwithstanding that further money of the trustee is afterwards paid in<sup>7</sup>.

The rule in *Clayton's Case*<sup>8</sup> has recently been reaffirmed as the *prima facie* rule, though it was said that, being a rule of convenience, it will not be applied if to do so would be impracticable or result in injustice<sup>9</sup>. It has since been said that it is plain<sup>10</sup> that the rule can be displaced by even a slight counterweight; indeed in terms of its actual application between beneficiaries who have in any sense met a shared misfortune, it might be more accurate to refer to the exception that is, rather than the rule in, *Clayton's Case*<sup>11</sup>.

The right to follow trust money is no more than an equity; and it does not prevail against a purchaser for valuable consideration without notice<sup>12</sup>. There is authority for the proposition that where an agent has received money as a bribe, there is no trust of the money until it has been declared by a judgment to be the principal's property; and until then it may not be followed as trust money<sup>13</sup>. The modern view, however, is that the bribe is held from the beginning on a constructive trust for the person injured by the breach of duty<sup>14</sup>.

1 *Foskett v McKeown* [2001] 1 AC 102, [2000] 3 All ER 97, HL; *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 533-534, 539, [1948] 2 All ER 318 at 353-354, 356, CA (affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL); *Sinclair v Brougham* [1914] AC 398, HL.

2 *Sinclair v Brougham* [1914] AC 398 at 442, HL, per Lord Parker; *Re Tilley's Will Trusts, Burgin v Croad* [1967] Ch 1179, [1967] 303.

3 See *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 529.

4 *Re Hallett's Estate, Knatchbull v Hallett* (1880) 13 ChD 696, CA; *Hancock v Smith* (1889) 41 ChD 456, CA; *Re Stenning, Wood v Stenning* [1895] 2 Ch 433.

5 *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 550, [1948] 2 All ER 318 at 362-363, CA; affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL.

6 *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 551-552, [1948] 2 All ER 318 at 363, CA; affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL; reheard on an amended statement of fact with regard to the claim against the National Institute for the Deaf sub nom *Re Diplock's Estate, Simpson v Lilburn* [1948] 2 All ER 429, CA.

7 *James Roscoe (Bolton) Ltd v Winder* [1915] 1 Ch 62.

8 See note 3 supra.

9 See *Barlow Clowes International Ltd (in liq) v Vaughan* [1992] 4 All ER 22, [1992] BCLC 910, CA.

10 Ie plain from *Barlow Clowes International Ltd (in liq) v Vaughan* [1992] 4 All ER 22, [1992] BCLC 910, CA.

11 See *Russell-Cooke Trust Co v Prentis* [2002] EWHC 2227 (Ch) at [55], [2003] 2 All ER 478, [2002] NLJR 1719 per Lindsay J. In *Barlow Clowes International Ltd (in liq) v Vaughan* [1992] 4 All ER 22, [1992] BCLC 910, CA, itself the rule in *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 529 was not applied and the available assets were ordered to be distributed pari passu among all unpaid investors rateably in proportion to the amounts due to them.

The 'rolling charge' or 'North American' solution (described in *Barlow Clowes International Ltd (in liq) v Vaughan* supra at 27-28 and at 916 by Dillon LJ as a system used to avoid a loss falling first on the depositor who happened to have made the first deposit in point of time) has not found favour in England and Wales. It was held to be impractical on the facts in *Barlow Clowes International Ltd (in liq) v Vaughan* supra, and Lindsay J said in *Russell-Cooke Trust Co v Prentis* supra at [57] that it was complicated and could be difficult to apply.

12 *Pennell v Deffell* (1853) 4 De GM & G 372 at 388 per Turner LJ. Where an executor who is also residuary legatee charges assets of the testator in favour of a mortgagee who has no notice of unsatisfied debts, or of anything which makes such dealing with the assets improper, the mortgagee's title prevails over that of the testator's creditors, although he may not obtain the legal estate in or control over the assets: *Graham v Drummond* [1896] 1 Ch 968.

13 *Lister & Co v Stubbs* (1890) 45 ChD 1, CA; *Re North Australian Territory Co, Archer's Case* [1892] 1 Ch 322 at 338, CA; *A-G's Reference (No 1 of 1985)* [1986] QB 491, [1986] 2 All ER 219, CA; *Islamic Republic of Iran Shipping Lines v Denby* [1987] 1 Lloyd's Rep 367; but see *Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 WLR 1256.

14 *A-G for Hong Kong v Reid* [1994] 1 AC 324, [1994] 1 All ER 1, PC; and see PARA 858 ante.

## UPDATE

### 864 Mixing of two trust funds, or of trust moneys with moneys of an innocent volunteer

NOTE 9--See also *Commerzbank Aktiengesellschaft v IMB Morgan plc* [2004] EWHC 2771 (Ch), [2005] 2 All ER (Comm) 564.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/6. EQUITABLE RELIEF IN CASES OF FIDUCIARY RELATIONSHIP/(2) FOLLOWING AND TRACING ASSETS/865. Direct claim in personam in equity to secure due administration of estates.

### **865. Direct claim in personam in equity to secure due administration of estates.**

A direct claim in personam against persons who have been wrongly paid or overpaid is allowed in equity in favour of creditors, legatees and next of kin when a personal representative has paid away the estate of a deceased person to the prejudice of their claims<sup>1</sup>. It makes no difference to the right to recover that there was no administration of the estate by the court<sup>2</sup>, or that the personal representative acted under a mistake of law as opposed to a mistake of fact in making the wrongful payment<sup>3</sup>. The right of recovery is affected neither by the fact that the original recipient had no right to receive anything from the deceased's estate<sup>4</sup> nor by the fact that the wrongly paid recipient had spent what he had received<sup>5</sup>. It is, however, subject to the qualification that the person rightfully entitled must first exhaust his remedy against the personal representative responsible for the wrongful payment<sup>6</sup>.

1 'Already in 1682 a creditor and a legatee shared the remedy established by the common justice of the Court of Chancery': *Ministry of Health v Simpson* [1951] AC 251 at 267, [1950] 2 All ER 1137 at 1141, HL, per Lord Simonds, citing *Noel v Robinson* (1682) 1 Vern 90 at 93. It is uncertain whether a similar right exists in the execution of a trust: see *Ministry of Health v Simpson* supra at 265- 266 and at 1140 per Lord Simonds. See also *Butler v Broadhead* [1975] Ch 97, [1974] 2 All ER 401; *Re J Leslie Engineers Co Ltd (in liq)* [1976] 2 All ER 85, [1976] 1 WLR 292.

2 *Re Diplock, Diplock v Wintle* [1948] Ch 465, [1948] 2 All ER 318, CA; affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL.

3 *Re Diplock, Diplock v Wintle* [1948] Ch 465, [1948] 2 All ER 318, CA; affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL. 'It would be a strange thing if the Court of Chancery, having taken upon itself to see that the assets of a deceased person were duly administered, was deterred from doing justice to creditor, legatee or next of kin because the executor had done him wrong under a mistake of law': *Ministry of Health v Simpson* supra at 270 and at 1143 per Lord Simonds. See also *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL. As to following assets of a deceased's estate see also *Clegg v Rowland* (1866) LR 3 Eq 368; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 514 et seq.

4 *Re Diplock, Diplock v Wintle* [1948] Ch 465, [1948] 2 All ER 318, CA; affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL.

5 *Ministry of Health v Simpson* [1951] AC 251 at 276, [1950] 2 All ER 1137 at 1147, HL, per Lord Simonds. When that case was in the Court of Appeal, sub nom *Re Diplock, Diplock v Wintle* [1948] Ch 465, [1948] 2 All ER 318, Lord Greene MR in his judgment gave prominence to the distinction between the right in personam and the right in rem.

6 *Orr v Kaines* (1750) 2 Ves Sen 194; *Re Diplock, Diplock v Wintle* [1948] Ch 465, [1948] 2 All ER 318, CA; affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL; see at 267, 270-271 and at 1141-1142, 1143-1144 per Lord Simonds.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/6. EQUITABLE RELIEF IN CASES OF FIDUCIARY RELATIONSHIP/(2) FOLLOWING AND TRACING ASSETS/866-900. Persons who may exercise the right and call for a refund.

### **866-900. Persons who may exercise the right and call for a refund.**

A creditor is entitled to follow the assets<sup>1</sup>; he may require a legatee to refund<sup>2</sup> and may recover from a specific legatee, but without prejudice to his rights against the executor or the residuary legatee<sup>3</sup>.

If the deceased's estate was originally insufficient to pay all legacies, a legatee who is unpaid may require a legatee who has been paid more than his due proportion to refund<sup>4</sup>. This is upon the ground that the payment to the first legatee was in fact improper, whether this was known to the personal representative or not<sup>5</sup>. Where, however, the estate was sufficient at the time of the payment to one legatee, but afterwards there is a deficiency, due either to the personal representative's insolvency or to accidental loss<sup>6</sup>, the paid legatee, who has received no more than at the time he was entitled to, may not be required to refund<sup>7</sup>.

Next of kin who are rightfully entitled may also exercise the equitable right to recover property from persons who have been wrongly paid<sup>8</sup>.

In general, the personal representative himself may not exercise the right and may not usually call upon a legatee to refund since, by voluntarily paying the legacy, he admits that the assets are sufficient<sup>9</sup>; but the personal representative may require the legatee to refund if he has paid under a court order<sup>10</sup>, or if debts, of which the personal representative had no notice at the time of the payment, are afterwards discovered<sup>11</sup>. In this respect a distinction exists between debts and contingent liabilities, such as a liability on unpaid shares; and a personal representative paying legacies with notice of contingent liabilities may require the legatee to refund<sup>12</sup>, but without interest<sup>13</sup>. Whilst a personal representative who, by mistake, has made an overpayment may not call for repayment<sup>14</sup>, he may reimburse himself out of funds in which the legatee is interested which remain in his hands<sup>15</sup>.

The limitation period applicable to a claim of this nature to recover property is 12 years from the time when the right to receive the property accrued, that is, 12 years from the expiration of the executor's year<sup>16</sup>. The remedy for the recovery of a legacy erroneously paid by the personal representative does not extend to the recovery of interest<sup>17</sup>.

1 In *Newman v Barton* (1690) 2 Vern 205 it was said that the creditor's right to follow assets extended 'into whosoever hands they come', but the right is not so wide and will not avail against a purchaser for value without notice: see note 2 infra. It is a case of following trust funds, since it is a breach of trust for the executor to pay legacies while the debts remain unpaid: *Fordham v Wallis* (1853) 10 Hare 217 at 226.

2 *Noel v Robinson* (1682) 1 Vern 90; *March v Russell* (1837) 3 My & Cr 31. Formerly the legatee was required to give security to refund in case further debts were discovered, but, though this was discontinued, his personal liability remained: *March v Russell* supra; and see *Re King*, *Mellor v South Australian Land Mortgage and Agency Co* [1907] 1 Ch 72; *National Assurance Co v Scott* [1909] 1 IR 325. The right can be exercised against volunteers under the legatee, but not against purchasers: *Noble v Brett* (1858) 24 Beav 499; *Dilkes v Broadmead* (1860) 24 Beav 499; *Dilkes v Broadmead* (1860) 2 De GF & J 566.

3 *Davies v Nicolson* (1858) 2 De G & J 693; *Noble v Brett* (1858) 24 Beav 499. As to the position where some legatees have been paid out of a fund in court see *Gillespie v Alexander* (1827) 3 Russ 130 at 138; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 520.

4 *Noel v Robinson* (1682) 1 Vern 90; *Anon* (1718) 1 P Wms 495; *Edwards v Freeman* (1727) 2 P Wms 435 at 447; *Walcott v Hall* (1788) 2 Bro CC 305; see contra *Newman v Barton* (1690) 2 Vern 205; cf *Orr v Kaines* (1750) 2 Ves Sen 194.

- 5 See 2 Bro CC (Belt's Edn) 305 notes (2), (3).
- 6 *Fenwick v Clarke* (1862) 4 De GF & J 240.
- 7 *Moore v Moore* (1755) 2 Ves Sen 596; *Walcott v Hall* (1788) 2 Bro CC 305; *Fenwick v Clarke* (1862) 4 De GF & J 240; *Peterson v Peterson* (1866) LR 3 Eq 111; *Re Winslow, Frere v Winslow* (1890) 45 ChD 249.
- 8 *David v Frowd* (1833) 1 My & K 200; *Mohan v Broughton* [1900] P 56, CA; *Re Diplock, Diplock v Wintle* [1948] Ch 465, [1948] 2 All ER 318, CA; affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL.
- 9 *Hodges v Waddington* (1679) 2 Cas in Ch 9; *Orr v Kaines* (1750) 2 Ves Sen 194; and see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 515.
- 10 *Newman v Barton* (1690) 2 Vern 205.
- 11 *Nelthrop v Hill* (1669) 1 Cas in Ch 135; *Jewon v Grant* (1677) 3 Swan App 659; and see *German v Lady Colston* (1678) 2 Rep Ch 137. Cf also the Trustee Act 1925 s 27(2); and TRUSTS vol 48 (2007 Reissue) PARA 915; presumably the claim would in practice be put forward by the creditor and, if the personal representative had duly advertised and administered the assets, would be pursued against the payee, not against the personal representative.
- 12 *Jervis v Wolferstan* (1874) LR 18 Eq 18; *Re Kershaw, Whittaker v Kershaw* (1890) 45 ChD 320, CA.
- 13 *Jervis v Wolferstan* (1874) LR 18 Eq 18.
- 14 *Hilliard v Fulford* (1876) 4 ChD 389.
- 15 *Livesey v Livesey* (1827) 3 Russ 287; *Cooper v Pitcher* (1845) 4 Hare 485; on appeal (1846) 16 LJ Ch 24.
- 16 *Re Diplock, Diplock v Wintle* [1948] Ch 465, [1948] 2 All ER 318, CA; affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL (where it was held that the Limitation Act 1939 s 20 (repealed: see now the Limitation Act 1980 s 22) applied to a claim of this nature).
- 17 *Gittins v Steele* (1818) 1 Swan 199; *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 506-507, [1948] 2 All ER 318 at 339, CA; affd sub nom *Ministry of Health v Simpson* [1951] AC 241, [1950] 2 All ER 1137, HL. Interest may, however, be recoverable where the property can be traced: *Re Diplock, Diplock v Wintle* supra at 557-558 and at 366. The period of limitation as regards interest in respect of a legacy is six years: see the Limitation Act 1980 s 22; and LIMITATION PERIODS vol 68 (2008) PARA 1161 et seq.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/7. EQUITABLE DEFENCES/(1) EQUITABLE SET-OFF/901. Set-off by statute.

## 7. EQUITABLE DEFENCES

### (1) EQUITABLE SET-OFF

#### 901. Set-off by statute.

Where the nature of dealings between two parties necessitates the keeping of an account, consisting of receipts and payments, debits and credits, on either side, no question of set-off<sup>1</sup> arises. It is only by taking the account and ascertaining the balance that the amount due from one party to the other can be ascertained, and it is this balance only that may be recovered<sup>2</sup>. Where there is no such current account, but there are simply mutual debts between two parties, then, apart from statute and the rules of procedure, no right of set-off exists at law<sup>3</sup>, and each party would be obliged to sue in different proceedings to recover his own debt<sup>4</sup>. The court may now grant to any defendant in any suit the same relief as might have been granted if he had been claimant in a suit<sup>5</sup>. Reliance may be placed in any court upon any equitable set-off which formerly could have been asserted in a court of equity; but it is not every cross-claim which may be presented as a set-off, nor does the mere fact that the cross-claim is in some way related to the transaction which gave rise to the claim serve to invest the cross-claim with the quality of set-off<sup>6</sup>. A right of set-off where there have been mutual credits, mutual debts or other mutual dealings has long been allowed in bankruptcy<sup>7</sup>.

1 As to set-off generally see CIVIL PROCEDURE vol 11 (2009) PARA 634 et seq.

2 As to settled accounts see PARA 452 ante.

3 See *Stooke v Taylor*(1880) 5 QBD 569 at 575 per Cockburn CJ; *Re Gregson, Christison v Bolam*(1887) 36 ChD 223 at 226 per North J; *Re Whitehouse & Co*(1878) 9 ChD 595 at 597 per Jessel MR.

4 *Green v Farmer* (1768) 4 Burr 2214 at 2221 per Lord Mansfield; cf *Dale v Sollet* (1767) 4 Burr 2133.

5 See the Supreme Court Act 1981 s 49 (replacing the Supreme Court of Judicature (Consolidation) Act 1925 s 39); and PARA 499 ante. The right to set off mutual debts between plaintiff (now known as 'claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18) and defendant, or between either party and a deceased person of whom the other party was executor or administrator, given by 2 Geo 2 c 22 (Insolvent debtors relief) (1728-29) s 13 and 8 Geo 2 c 24 (Set-off) (1734-35) s 4 (both repealed), is preserved and regulated by CPR 16.6: see CIVIL PROCEDURE vol 11 (2009) PARA 634 et seq.

6 *Hanak v Green*[1958] 2 QB 9 at 22-23, [1958] 2 All ER 141 at 149, CA, per Morris LJ; and see at 26 and at 152 per Morris LJ ('The question as to what is a set-off is to be determined as a matter of law and is not in any way governed by the language used by the parties in their pleadings'). See also *First National Bank of Chicago v West of England Shipowners Mutual Protection and Indemnity Association, (Luxembourg), The Evelpidis Era* [1981] 1 Lloyd's Rep 54.

7 Ie beginning with 4 & 5 Anne c 4 (Bankrupts) s 11 and 5 Geo 2 c 30 (Bankrupts) s 28. See now the Insolvency Act 1986 s 323; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 547 et seq.

## UPDATE

### 901 Set-off by statute

NOTE 5--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force on 1 October 2009: SI 2009/1604).



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/7. EQUITABLE DEFENCES/(1) EQUITABLE SET-OFF/902. Set-off in equity.

## **902. Set-off in equity.**

The former Court of Chancery recognised the right to set-off before that right was allowed by statute<sup>1</sup>. It was natural equity that cross-demands should compensate each other, by deducting the lesser sum from the greater, and the difference was the only sum which was justly due<sup>2</sup>. The right does not depend on finding any express or implied contract between the parties that there shall be set-off; the position is the other way round<sup>3</sup>. Clear words are required to rebut the presumption that a party does not intend to abandon rights of set-off<sup>4</sup>.

Equity did not, however, allow set-off as between mutual independent debts generally; in addition to the existence of cross-demands it was necessary that there should be some special equity to call for a set-off. It must be established, first, that the counterclaim is at least closely connected with the same transaction as that giving rise to the claim; and secondly, that the relationship between the respective claims is such that it would be manifestly unjust to allow one to be enforced without regard to the other<sup>5</sup>. The required equity existed where, even though the debts were distinct, one party had given credit to the other on the faith of the debt to himself being paid<sup>6</sup>. Fresh grounds of equitable set-off arose after the passing of the relevant statutes owing to the equitable construction put upon the statutes by courts of equity. If one debt was legal and the other equitable, a set-off was allowed<sup>7</sup>. Cases were held to be within the equity of the statutes even where they were not within their actual words. However, courts of equity, following the spirit of the statutes, would not allow a person to set off, even at law, where there was an equity to prevent his doing so, that is to say where the rights, although legally mutual, were not equitably mutual<sup>8</sup>.

Where there are cross-demands between two parties of such a nature that, if both were recoverable at law, they would be the subject of legal set-off, the set-off will be enforced in equity if either of the demands is a matter of equitable jurisdiction<sup>9</sup>. Equity, following the law, usually requires that the debts which are to be set off against each other shall be due from and to the parties in the same right. It does not allow a set-off of debts accruing in different rights<sup>10</sup>, for example a set-off of a joint debt against a separate debt<sup>11</sup>, unless there is a series of transactions clearly showing that joint credit was given on account of the separate debt<sup>12</sup>, or, in general, a set-off of a debt due from an executor personally against a debt owing to the estate<sup>13</sup>.

In order that demands may be set off against each other it is necessary that each should be recoverable by action<sup>14</sup>, since set-off is in the nature of a cross-claim<sup>15</sup>, and set-off cannot be used so as indirectly to make a debt transferable which is by statute not transferable<sup>16</sup>. Equitable set-off is not available if it arose after the claim was begun<sup>17</sup>. Nor is it available as a defence either to a claim on a dishonoured cheque<sup>18</sup>, or, probably, to a claim following a cancelled direct debit<sup>19</sup>. Where, under a court order or an arbitrator's award, each party has to pay a sum to the other, the sums are set off<sup>20</sup>, but there is no set-off of costs in independent proceedings<sup>21</sup>. Nor can a defendant set off a cross-claim against someone other than the claimant<sup>22</sup>.

The defence of set-off is available not only against a monetary claim but also where the claim in the proceedings is for relief other than money, including equitable relief such as specific performance, if the other relief is dependent on the non-payment of a money claim to which there is an equitable right of set-off<sup>23</sup>; and also against a claim by a landlord to levy distress<sup>24</sup>.

- 1 *Curson v African Co* (1682) 1 Vern 121; *Peters v Soame* (1701) 2 Vern 428; *Ex p Stephens* (1805) 11 Ves 24 at 27 per Lord Eldon LC; *Ex p Blagden* (1815) 19 Ves 465 at 467; and see *Freeman v Lomas* (1851) 9 Hare 109 at 112-113 per Turner V-C; *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc, The Lorfri, The Nanfri, The Benfri* [1978] QB 927 at 974, [1978] 3 All ER 1066 at 1078, CA, per Lord Denning MR (affd in part without discussion of this point [1979] AC 757, [1979] 1 All ER 307, HL); *Guinness plc v Saunders* [1988] BCLC 43 (affd [1988] 2 All ER 940, [1988] 1 WLR 863, CA); *Re Bank of Credit and Commerce International Ltd (No 8)* [1996] Ch 245, [1996] 2 All ER 121, CA; affd [1998] AC 214, [1997] 4 All ER 568, HL. As to waiver of the right of set-off see *Halesowen Presswork & Assemblies Ltd v Westminster Bank Ltd* [1971] 1 QB 1, [1970] 3 All ER 473, CA; *Hongkong & Shanghai Banking Corp v Kloeckner & Co AG* [1990] 2 QB 514, [1989] 3 All ER 513. As to contracting out of the right to equitable set-off see CIVIL PROCEDURE vol 11 (2009) PARA 664. As to the former Court of Chancery see PARAS 401-403 ante.
- 2 *Green v Farmer* (1768) 4 Burr 2214 at 2220 per Lord Mansfield CJ; *Smith (administrator of Cosslett (Contractors) Ltd) v Bridgend County Borough Council* [2001] UKHL 58 at [36], [2002] 1 AC 336, [2002] 1 All ER 292 per Lord Hoffmann, citing *Hanak v Green* [1958] 2 QB 9, [1958] 2 All ER 141, CA ('equitable set-off depends upon showing some equitable reason for protection against the plaintiff's demand'). A 'plaintiff' in civil proceedings is now generally known as a 'claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18.
- 3 *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 at 717, [1973] 3 All ER 195 at 215, HL, per Lord Diplock; *BICC plc v Burndy Corp* [1985] Ch 232 at 248, [1985] 1 All ER 417 at 425, CA, per Dillon LJ.
- 4 *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1994] 4 All ER 834, [1994] 1 WLR 501, CA; *Esso Petroleum Co Ltd v Milton* [1997] 2 All ER 593, [1997] 1 WLR 938, CA; *BOC Group plc v Centeon LLC* [1999] 1 All ER (Comm) 970, CA; cf *Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Corp (Sinochem International Oil Co Ltd third party)* [2000] 1 All ER (Comm) 474, [2000] 1 Lloyd's Rep 339, CA. An express exclusion clause may be unenforceable if it is unreasonably wide: *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] QB 600, [1992] 2 All ER 257, CA; *Esso Petroleum Co Ltd v Milton* supra.
- 5 *Hanak v Green* [1958] 2 QB 9, [1958] 2 All ER 141, CA; *Federal Commerce and Navigation Ltd v Molena Alpha Inc, The Nanfri, The Benfri, The Lorfri* [1978] QB 927, [1978] 3 All ER 1066, CA (affd [1979] AC 757, [1979] 1 All ER 307, HL); *McDonald's Restaurants Ltd v Urbandivide Co Ltd* [1994] 1 BCLC 306; *Barnett v Peter Cox Group Ltd* (1995) 45 ConLR 131, CA; *Esso Petroleum Co Ltd v Milton* [1997] 2 All ER 593, [1997] 1 WLR 938, CA; *Peninsular & Oriental Steam Navigation Co v Youell* [1997] 2 Lloyd's Rep 136, CA; *TSB Bank plc v Platts* [1998] 2 BCLC 1, [1998] 12 LS Gaz R 28, CA. 'Equitable set-off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand': *Rawson v Samuel* (1841) Cr & Ph 161 at 178 per Lord Cottenham LC, doubting *Williams v Davies* (1829) 2 Sim 461 at 463; *Insituform (Ireland) Ltd v Insituform Group Ltd* (1990) Times, 27 November, CA. See also *Whyte v O'Brien* (1824) 1 Sim & St 551; *Hanak v Green* supra at 18-19 and at 147, CA, per Morris LJ; *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, [1973] 3 All ER 195, HL; *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137, [1979] 2 All ER 1063; *Melville v Grapelodge Developments Ltd* (1978) 39 P & CR 179; *First National Bank of Chicago v West of England Shipowners Mutual Protection & Indemnity Association (Luxembourg)*, *The Evelpidis Era* [1981] 1 Lloyd's Rep 54; *Box v Midland Bank Ltd* [1981] 1 Lloyd's Rep 434, CA; *Miles v Wakefield Metropolitan District Council* [1987] AC 539, [1987] 1 All ER 1089, HL; *Shell International Petroleum Co Ltd v Transnor (Bermuda) Ltd* [1987] 1 Lloyd's Rep 363; *Dole Dried Fruit & Nut Co v Trustin Kerwood Ltd* [1990] 2 Lloyd's Rep 309, CA; *Century Textiles and Industry Ltd v Tomoe Shipping Co (Singapore) Pte Ltd, The Aditya Vaibhav* [1991] 1 Lloyd's Rep 573; *National Westminster Bank plc v Skelton* [1993] 1 All ER 242, [1993] 1 WLR 72n, CA; *Filross Securities Ltd v Midgeley* (1998) 31 HLR 465, [1998] 3 EGLR 43, CA; *Melham Ltd v Burton (Collector of Taxes)* [2003] EWCA Civ 173, [2003] STC 441, [2003] All ER (D) 94 (Jan). Otherwise equity follows the statutory right at law: *Ex p Stephens* (1805) 11 Ves 24; *James v Kynnier* (1799) 5 Ves 108 at 112. The set-off was at one time restricted to liquidated demands (*Rawson v Samuel* (1841) Cr & Ph 161; *Best v Hill* (1872) LR 8 CP 10); but unliquidated as well as liquidated damages may now be set off as between the original parties, and also against an assignee, where the cross-claim is such as 'impeached the title to the legal demand' (*Rawson v Samuel* supra at 179 per Lord Cottenham LC; *Piggott v Williams* (1821) 6 Madd 95; *Morgan & Son Ltd v S Martin Johnson & Co Ltd* [1949] 1 KB 107, [1948] 2 All ER 196, CA; *Sim v Rotherham Metropolitan Borough Council* [1987] Ch 216, [1986] 3 All ER 387 (equitable set-off may be applicable to employment contracts); *New Centurion Trust v Welch* [1990] IRLR 123, EAT (principles upon which equitable set-off effective in claim for wages severely limited)) or, as it was put by Lord Hobhouse in *Newfoundland Government v Newfoundland Rly Co* (1888) 13 App Cas 199 at 213, PC, where it is a cross-claim 'flowing out of and inseparably connected with the dealings and transactions which also give rise' to the claim. See also *R & T Thew Ltd v Reeves* [1982] QB 172, [1981] 2 All ER 964, CA; *Guinness plc v Saunders* [1988] 2 All ER 940, [1988] 1 WLR 863, CA; *Bank of Boston Connecticut v European Grain and Shipping Ltd, The Dominique* [1989] AC 1056, [1989] 1 All ER 545, HL.

There is generally no right to set off a claim for damages for breach of a charterparty against a claim for freight under a voyage charter whether the breach is repudiatory or non-repudiatory: *Aries Tanker Corp v Total Transport Ltd, The Aries* [1977] 1 All ER 398, [1977] 1 WLR 185, HL; *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* supra; *Cleobulos Shipping Co Ltd v Intertanker Ltd, The Cleon* [1983] 1 Lloyd's Rep 586, CA; *Elena Shipping Ltd v Aidenfield Ltd, The Elena* [1986] 1 Lloyd's Rep 425; *Bank of Boston*

*Connecticut v European Grain and Shipping Ltd, The Dominique* supra. It has been held with reluctance that the rule applies generally to domestic carriage of goods by land: *United Carriers Ltd v Heritage Food Group (UK) Ltd* [1995] 4 All ER 95, [1996] 1 WLR 371. Set-off is available, however, against a claim for time charter hire: *Federal Commerce and Navigation Ltd v Molena Alpha Inc, The Nanfri, The Benfri, The Lorfri* [1978] QB 927, [1978] 3 All ER 1066, CA (affd in part [1979] AC 757, [1979] 1 All ER 307, HL); *Cia Sud Americana de Vapores v Shipmair BV, The Teno* [1977] 2 Lloyd's Rep 289; *Santiren Shipping Ltd v Unimarine SA, The Chrysovalandou-Dyo* [1981] 1 All ER 340; *SL Sethia Liners Ltd v Naviagro Maritime Corpn, The Kostas Melas* [1981] 1 Lloyd's Rep 18; *Leon Corpn v Atlantic Lines and Navigation Co Inc, The Leon* [1985] 2 Lloyd's Rep 470.

6 Thus, where A is indebted to B in £10,000 on bond, and B borrows from A £2,000 on his own bond, the bonds being payable at different times, the nature of the transaction leads to the presumption that there was a mutual credit between the parties as to the £2,000, as an ultimate set-off pro tanto from the debt of £10,000: Story, Equity Jurisprudence s 1435. In all cases of mutual credit it is natural justice and equity that only the balance should be paid: *Lord Lanesborough v Jones* (1716) 1 P Wms 325 at 326 per Lord Cowper LC. This is based on the presumed intention or agreement of the parties; 'the least evidence of an agreement for a stoppage [ie a set-off] will do; and in these cases equity will take hold of a very slight thing to do both parties right': *Jefferies v Wood* (1723) 2 P Wms 128 at 130; and see *Re Prescott, ex p Prescott* (1753) 1 Atk 230.

7 *Hunt v Jessel* (1854) 18 Beav 100.

8 *Re Whitehouse & Co* (1878) 9 ChD 595 at 597 per Jessel MR.

9 *Clark v Cort* (1840) Cr & Ph 154; *Freeman v Lomas* (1851) 9 Hare 109; cf *Thornton v Maynard* (1875) LR 10 CP 695 at 699; *Taylor v Taylor* (1875) LR 20 Eq 155 at 160; and see *Barclays Bank v Aschaffenburg Zellstoffwerke AG* (1967) 111 Sol Jo 350, CA. See generally CIVIL PROCEDURE vol 11 (2009) PARA 634 et seq.

10 Story, Equity Jurisprudence s 1437; *Freeman v Lomas* (1851) 9 Hare 109 at 114; and see *Cavendish v Geaves* (1857) 24 Beav 163; *Re Paraguassu Steam Tramroad Co, Black & Co's Case* (1872) 8 Ch App 254 at 261; *Phillips v Howell* [1901] 2 Ch 773. For cases where set-off was allowed, or a debt extinguished, where the debt was the husband's and a sum was due to the wife, see *Re Price, Price v Price* (1879) 11 ChD 163 at 166, CA; *Re Batchelor, Sloper v Oliver* (1873) LR 16 Eq 481; *Re Briant, Poulter v Shackel* (1888) 39 ChD 471. A debt may be set off even though it was acquired by assignment: *Bennett v White* [1910] 2 KB 643, CA; cf *NW Robbie & Co Ltd v Witney Warehouse Co Ltd* [1963] 3 All ER 613, [1963] 1 WLR 1324, CA (debt sought to be set off assigned to party with knowledge of appointment of receiver); and see COMPANIES vol 15 (2009) PARA 1271.

11 *Ex p Twogood* (1805) 11 Ves 517; *Addis v Knight* (1817) 2 Mer 117 at 122. This may, however, be done in the interest of a joint debtor who is a surety (*Ex p Hanson* (1806) 12 Ves 346; (1811) 18 Ves 232), or where there is fraud raising a special equity to a set-off (*Ex p Stephens* (1805) 11 Ves 24).

12 *Vulliamy v Noble* (1817) 3 Mer 593 at 618.

13 See eg *Bishop v Church* (1748) 3 Atk 691 and CIVIL PROCEDURE vol 11 (2009) PARA 690. As to equitable set-off of bank accounts see *Ex p Morier, Re Willis, Percival & Co* (1879) 12 ChD 491, CA; *Re Hett Maylor & Co Ltd* (1894) 10 TLR 412; *Bhogal v Punjab National Bank, Basna v Punjab National Bank* [1988] 2 All ER 296, CA; *Uttamchandani v Central Bank of India* [1989] NLJR 222, CA.

14 *Francis v Dodsworth* (1847) 4 CB 202 at 220; *Rawley v Rawley* (1876) 1 QBD 460, CA; *Smith v Betty* [1903] 2 KB 317, CA. An 'action' is now generally known as a 'claim': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

15 *Walker v Clements* (1850) 15 QB 1046; and see CPR 16.6; and CIVIL PROCEDURE vol 11 (2009) PARA 634 et seq. Hence a statute-barred debt cannot be set off against a debt not barred: *Walker v Clements* supra; *The Brede* [1974] QB 233, [1973] 3 All ER 589, CA.

16 *Gathercole v Smith* (1881) 17 ChD 1, CA.

17 *Richards v James* (1848) 2 Exch 471; *Edmunds v Lloyd Italico e L'Ancora Cia di Assicurazioni e Riassicurazioni SpA* [1986] 2 All ER 249 at 252, [1986] 1 WLR 492 at 495, CA. See also *Business Computers Ltd v Anglo-African Leasing Ltd* [1977] 2 All ER 741 at 747, [1977] 1 WLR 578 at 585 per Templeman J; *Black King Shipping Corpn and Wayang (Panama) SA v Mark Ranald Massie, The Litsion Pride* [1985] 1 Lloyd's Rep 437 at 518 per Hirst J.

18 See *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 2 All ER 463 at 470, [1977] 1 WLR 713 at 721, HL, per Lord Wilberforce.

19 This was the view of the majority in *Esso Petroleum Co Ltd v Milton* [1997] 2 All ER 593, [1997] 1 WLR 938, who considered that since modern commercial practice was to treat a direct debit in the same way as a payment by cheque and, as such, the equivalent of cash, the effect of cancelling a direct debit was the same as countermanding payment by cheque.

20 *Pringle v Gloag* (1879) 10 ChD 676. Where a party entitled to be paid costs is also liable to pay costs, the court may assess the costs which that party is liable to pay and either set off the amount assessed against the amount the party is entitled to be paid and direct him to pay any balance, or delay the issue of a certificate for the costs to which the party is entitled until he has paid the amount which he is liable to pay: see CPR 44.3(9); and CIVIL PROCEDURE vol 12 (2009) PARA 1741. See also *Goodfellow v Gray* [1899] 2 QB 498. As to set-off of costs against damages and costs to which a legally aided person is entitled see *Lockley v National Blood Transfusion Service* [1992] 2 All ER 589, [1992] 1 WLR 492, CA; and CIVIL PROCEDURE vol 12 (2009) PARA 1729 et seq.

21 *David v Rees* [1904] 2 KB 435, CA; *Bake v French* [1907] 1 Ch 428; and see CIVIL PROCEDURE vol 11 (2009) PARA 634 et seq; CIVIL PROCEDURE vol 12 (2009) PARA 1729 et seq.

22 *Smith v Muscat* [2003] EWCA Civ 962, [2003] 35 LS Gaz R 37, [2003] All ER (D) 192 (Jul).

23 *BICC plc v Burndy Corpn* [1985] Ch 232, [1985] 1 All ER 417, CA.

24 *Eller v Grovecrest Investments Ltd* [1995] QB 272, [1994] 4 All ER 845, CA; *Fuller v Happy Shopper Markets Ltd* [2001] 1 WLR 1681, [2001] 2 Lloyd's Rep 49.

## UPDATE

### 902 Set-off in equity

NOTE 5--*Melham*, cited, reversed: [2006] UKHL 6, (2006) 77 TC 608.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/7. EQUITABLE DEFENCES/(1) EQUITABLE SET-OFF/903. Retainer of debt out of legacy or share of residue.

### **903. Retainer of debt out of legacy or share of residue.**

Where a testator leaves a legacy or a share of residue to his debtor, the debtor is not entitled to receive anything out of the estate until he has paid his debt; and consequently the executor may retain the debt out of the legacy or share of residue, even though it is statute-barred<sup>1</sup>.

<sup>1</sup> *Courtenay v Williams* (1844) 3 Hare 539; on appeal (1846) 15 LJ Ch 204; and see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 488. As to the application of the principle between a company and a debenture holder see COMPANIES; and as to retainer by trustees against beneficiaries see TRUSTS vol 48 (2007 Reissue) PARA 923.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/7. EQUITABLE DEFENCES/(1) EQUITABLE SET-OFF/904. No set-off against calls in winding up.

**904. No set-off against calls in winding up.**

In the winding up of a company a creditor of the company who is also a shareholder may not set off the debt owed to him against calls on his shares. Before participating as a creditor in the assets, he must make the contribution to the assets which is due from him<sup>1</sup>.

<sup>1</sup> See eg *Grissell's Case* (1866) 1 Ch App 528; and see further COMPANIES.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/7. EQUITABLE DEFENCES/(1) EQUITABLE SET-OFF/905. Set-off and assignee of chose in action.

**905. Set-off and assignee of chose in action.**

An assignee of a chose in action takes subject to rights of set-off between the debtor and creditor, unless such rights are expressly excluded by the contract creating the chose in action or otherwise<sup>1</sup>.

<sup>1</sup> See CHOSSES IN ACTION vol 13 (2009) PARA 60 et seq.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/7. EQUITABLE DEFENCES/(2) RELEASE AND WAIVER/906. Release.

## (2) RELEASE AND WAIVER

### 906. Release.

At law a right of action arising solely on a deed may be released only by deed, and a right of action arising otherwise may be discharged either by deed of release or by accord and satisfaction<sup>1</sup>; but in equity an agreement to release the right made for valuable consideration is in all cases effective as a release, and this rule now applies both to legal and equitable rights<sup>2</sup>. Moreover, even though there is no consideration, a release of an equitable interest or right may, it seems, be effected by signed writing, or even orally, provided the intention is to grant an immediate release<sup>3</sup>; such a release, although not in itself effective to discharge a legal right of action, becomes effective if the legal right of action is subsequently extinguished<sup>4</sup>. In practice, however, a gratuitous release of a legal or equitable right of action should be by deed<sup>5</sup>.

There is no room for any special 'rules' of interpretation in the case of general releases<sup>6</sup>. A party can, at any rate in a compromise agreement supported by valuable consideration, agree to release claims or rights of which he is unaware and of which he could not be aware, but the court will be slow to infer that he has done so in the absence of appropriate language to make it plain<sup>7</sup>.

1 See CONTRACT vol 9(1) (Reissue) PARA 1043 et seq; DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 12, 151. Any rule of law which required a seal for the valid execution of an instrument as a deed by an individual has, except in relation to a corporation sole, been abolished: see the Law of Property (Miscellaneous Provisions) Act 1989 s 1(1)(b), (10); and CIVIL PROCEDURE vol 11 (2009) PARA 865.

Where there has been a true accord under which the creditor voluntarily agrees to accept a lesser sum in satisfaction, and the debtor acts upon that accord by paying the lesser sum and the creditor accepts it, it is inequitable for the creditor afterwards to insist on the balance; but, unless there has truly been an accord, there is no reason in law or equity why the creditor should not enforce the full amount of the debt due to him: *D and C Builders Ltd v Rees*[1966] 2 QB 617 at 625, [1965] 3 All ER 837 at 841, CA, per Lord Denning MR.

2 *Steeds v Steeds*(1889) 22 QBD 537, DC; *Edwards v Walters*[1896] 2 Ch 157 at 168, CA; *Berry v Berry*[1929] 2 KB 316. The Unfair Contract Terms Act 1977 does not apply to compromises or waivers of existing claims arising from past actions: *Tudor Grange Holdings Ltd v Citibank NA*[1992] Ch 53, [1991] 4 All ER 1.

3 See *Re Hall, Holland v A-G*[1941] 2 All ER 358 at 370; affd on other grounds [1942] Ch 140, [1942] 1 All ER 10, CA; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 25 and the discussion there of *Re Hancock, Hancock v Berrey* (1888) 57 LJ Ch 793. There seems to be no objection to a release being oral provided that the evidence of it is clear (see *Strong v Bird*(1874) LR 18 Eq 315); but the evidence must show an immediate release, not a mere expression of intention not to enforce the debt (*Byrn v Godfrey* (1798) 4 Ves 6).

4 *Strong v Bird*(1874) LR 18 Eq 315; and see PARA 610 ante; and GIFTS vol 52 (2009) PARA 270.

5 See *Bank of Credit and Commerce International SA (in liq) v Ali*[2000] 3 All ER 51 at 55, [2000] ICR 1410 at 1415, CA (para 10) (affd on different grounds [2001] UKHL 8, [2002] 1 AC 251, [2001] 1 All ER 961), where Sir Richard Scott V-C said that a unilateral general release must be by deed in order to bind the releasor, but did not advert to a possible distinction between legal and equitable claims.

6 *Bank of Credit and Commerce International SA (in liq) v Ali* [2001] UKHL 8, [2002] 1 AC 251, [2001] 1 All ER 961. As to the principles of interpretation see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 164 et seq.



7 *Bank of Credit and Commerce International SA (in liq) v Ali* [2001] UKHL 8, [2002] 1 AC 251, [2001] 1 All ER 961 (on the true construction of the release in that case it was impossible to conclude that the parties had intended to provide for the release of rights and the surrender of claims which they could never have had in contemplation at all; their Lordships did not therefore need to consider the ground of the decision in the Court of Appeal ([2000] 3 All ER 51, [2000] ICR 1410) that where the terms of the release as a matter of construction covered the claim in question, it would be unconscionable to allow it to be relied on as defence to a claim based on facts known to the releasee but not the releasor, and which he had deliberately concealed from the releasor in circumstances where he knew or believed that the releasor could not discover them for himself).

## **UPDATE**

### **906 Release**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/7. EQUITABLE DEFENCES/(2) RELEASE AND WAIVER/907. Waiver.

## **907. Waiver.**

The expression 'waiver' may, in law, bear different meanings<sup>1</sup>. The primary meaning has been said to be the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted<sup>2</sup>, and is either express or implied from conduct. It may arise by virtue of a party making an election, for example whether or not to exercise a contractual right. The most familiar case of election is, perhaps, where one party to a contract repudiates it, which gives the other party the choice of accepting the repudiation or affirming the contract, thereby waiving or abandoning his right to terminate it<sup>3</sup>. Once made, his election is final and binding, and consideration is not required. Generally the party making the election must be aware of the facts which have given rise to the existence of his new right<sup>4</sup>. Waiver may also arise by virtue of equitable or promissory estoppel<sup>5</sup>; unlike waiver arising from an election, no question arises of any particular knowledge on the part of the person making the representation, and the estoppel may be suspensory only<sup>6</sup>.

A person who is entitled to rely on a stipulation, existing for his benefit alone<sup>7</sup>, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist<sup>8</sup>. Waiver of this kind depends upon consent<sup>9</sup>; and the fact that the other party has acted on it is sufficient consideration<sup>10</sup>.

Where the waiver is not express, it may be implied from conduct which is inconsistent with the continuance of the right<sup>11</sup>, without the need for writing or for consideration moving from, or detriment to, the party who benefits by the waiver<sup>12</sup>, but mere acts of indulgence will not amount to waiver<sup>13</sup>; nor may a party benefit from the waiver unless he has altered his position in reliance on it<sup>14</sup>. The waiver may be terminated by reasonable, but not necessarily formal, notice<sup>15</sup> unless the party who benefits by the waiver cannot resume his position<sup>16</sup>, or termination would cause injustice to him<sup>17</sup>.

It seems that, in general, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, so as to alter his position, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he has himself so introduced, even though it is not supported in point of law by any consideration<sup>18</sup>.

Where the right is a right of action or an interest in property, an express waiver depends upon the same considerations as a release. If it is a mere statement of an intention not to insist upon the right, it is not effectual unless made with consideration; but, where there is consideration, the statement amounts to a promise and operates as a release<sup>19</sup>. Even where there is no express waiver, the person entitled to the right may so conduct himself that it becomes inequitable to enforce it (this is sometimes called an implied waiver); but in such cases the right is lost on the ground either of estoppel or of acquiescence, whether by itself or accompanied by delay<sup>20</sup>. Where it is claimed that the decision of a tribunal is a nullity, a party's right of action in the High Court is not waived by appeal to a higher tribunal whose decision is expressed by Parliament to be final<sup>21</sup>.

1 *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India, The Kanchenjunga* [1990] 1 Lloyd's Rep 391 at 397, HL, per Lord Goff of Chieveley; *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at 882-883, [1970] 2 All ER 871 at 894, HL, per Lord Diplock; *Ross T Smyth & Co Ltd v TD Bailey Son & Co* [1940] 3 All ER 60 at 70 per Lord Wright ('the word "waiver" is a vague term used in many senses'). See also *Telfair Shipping Corp v Athos Shipping Co SA, Solidor Shipping Co Ltd, Horizon Finance Corp and AN Cominos, The Athos* [1983] 1 Lloyd's Rep 127, CA; *Youell v Bland Welch & Co Ltd (No 2)* [1990] 2 Lloyd's Rep 431 at 449 per Phillips J (distinction between election and equitable estoppel often elusive); *Cia Tirrena di Assicurazioni SpA v Grand Union Insurance Co Ltd* [1991] 2 Lloyd's Rep 143; *HIH Casualty & General Insurance Ltd v AXA Corporate Solutions* [2002] Lloyd's Rep IR 325, [2001] All ER (D) 384 (Dec); affd [2002] EWCA Civ 1253, [2002] 2 All ER (Comm) 1053, [2003] Lloyd's Rep IR 1.

2 *Banning v Wright* [1972] 2 All ER 987 at 998, [1972] 1 WLR 972 at 979, HL, per Lord Hailsham of St Marylebone LC; *Re National Jazz Centre Ltd* [1988] 2 EGLR 57 at 58 per Peter Gibson J ('one must be able to spell out of the negotiations the admission that is sought to be relied on').

3 In order to establish waiver based on election it is not necessary to prove reliance on detriment, merely a representation and the required knowledge: *Sea Calm Shipping Co SA v Chantiers Navals de l'Esterel SA, The Uhenbels* [1986] 2 Lloyd's Rep 294; and see *Nurcombe v Nurcombe* [1985] 1 All ER 65, [1985] 1 WLR 370, CA; *Youell v Bland Welch & Co Ltd (No 2)* [1990] 2 Lloyd's Rep 431.

4 *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India, The Kanchenjunga* [1990] 1 Lloyd's Rep 391, HL; *Slough Estates Ltd v Slough Borough Council (No 2)* [1969] 2 Ch 305, [1969] 2 All ER 988, CA (on appeal [1971] AC 958, [1970] 2 All ER 216, HL, where this point was not dealt with); *Cremer v Granaria BV, Granaria BV v Schwarze* [1981] 2 Lloyd's Rep 583; *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* (1983) 46 P & CR 313, CA; *Banner Industrial and Commercial Properties Ltd v Clark Paterson Ltd* [1990] 2 EGLR 139.

5 As to promissory estoppel see further ESTOPPEL vol 16(2) (Reissue) PARAS 958, 1082 et seq.

6 *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India, The Kanchenjunga* [1990] 1 Lloyd's Rep 391 at 399, HL, per Lord Goff of Chieveley; *J Willis & Son v Willis* [1986] 1 EGLR 62, CA (whether it was called promissory estoppel or equitable estoppel or quasi-estoppel, the root question was whether it would be inequitable for the applicant to rely on his strict legal rights. Quare whether it was not in fact a case of proprietary estoppel, as to which see ESTOPPEL vol 16(2) (Reissue) PARA 1089 et seq.). See the cases cited in note 18 infra; and ESTOPPEL. See also *Panchaud Frères SA v Ets General Grain Co* [1970] 1 Lloyd's Rep 53, CA; *Intertradex SA v Lesieur-Tourteaux SARL* [1978] 2 Lloyd's Rep 509, CA; *HIH Casualty & General Insurance Ltd v AXA Corporate Solutions* [2002] Lloyd's Rep IR 325, [2001] All ER (D) 384 (Dec); affd [2002] EWCA Civ 1253, [2002] 2 All ER (Comm) 1053, [2003] Lloyd's Rep IR 1.

7 *Bennett v Fowler* (1840) 2 Beav 302; *Hawksley v Outram* [1892] 3 Ch 359, CA; *Heron Garage Properties Ltd v Moss* [1974] 1 All ER 421, [1974] 1 WLR 148.

8 He may not do so, however, when the stipulation exists for the benefit of the other party as well: *Lloyd v Nowell* [1895] 2 Ch 744; *Heron Garage Properties Ltd v Moss* [1974] 1 All ER 421, [1974] 1 WLR 148.

9 Eg waiver of notice prior to sale by a mortgagee: *Selwyn v Garfit* (1888) 38 ChD 273 at 284, CA per Bowen LJ ('waiver is consent to dispense with the notice'); *Re Thompson and Holt* (1890) 44 ChD 492. As to waiver of stipulations in a contract see CONTRACT vol 9(1) (Reissue) PARA 1025 et seq; and as to parol waiver of the contract itself see *Price v Dyer* (1810) 17 Ves 356. Delay is not necessarily waiver, although it may be evidence of waiver (*Selwyn v Garfit* supra); and see *Earl of Darnley v London, Chatham and Dover Rly Co* (1867) LR 2 HL 43.

10 See *Re Stokoe, ex p Moore* (1876) 2 ChD 802, CA (waiver of statutory requirement as to time for disclaimer by trustee in bankruptcy); *Ocean Star Tankers SA v Total Transport Corp of Liberia Ltd, The Taygetos (No 2)* [1988] 2 Lloyd's Rep 474 (owners argued unsuccessfully that charterers had waived compliance with a provision in a charterparty; waiver required proof of a clear and unequivocal representation by the charterers that compliance with the proviso was not required and of sufficient reliance on that representation to render it just and equitable that the charterers should be precluded from relying on it). See also *Finagrain SA Geneva v P Kruse Hamburg* [1976] 2 Lloyd's Rep 508, CA; *Bunge SA v Schleswig-Holsteinische Landwirtschaftliche Hauptgenossenschaft Eingetr GmbH* [1978] 1 Lloyd's Rep 480; *Intertradex SA v Lesieur-Tourteaux SARL* [1978] 2 Lloyd's Rep 509, CA; *Bremer Handelsgesellschaft MbH v C Mackprang Jnr* [1979] 1 Lloyd's Rep 221, CA; *Bremer Handelsgesellschaft mbH v C Mackprang Jnr* [1981] 1 Lloyd's Rep 292, CA; *Telfair Shipping Corp v Athos Shipping Co SA, Solidor Shipping Co Ltd, Horizon Finance Corp and AN Cominos, The Athos* [1983] 1 Lloyd's Rep 127, CA; *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade* [1983] QB 529, [1983] 1 All ER 301, CA; affd [1983] 2 AC 694, [1983] 2 All ER 763, HL.

11 *Keene v Biscoe* (1878) 8 ChD 201 at 203 (acceptance of mortgage interest in arrear not inconsistent with, and therefore not a waiver of, right to call in principal for non-punctual payment); but it is one of the facts to be

considered in determining whether the mortgagee has waived such right (*Seal v Gimson* (1914) 110 LT 583); and see *Norton v Wood* (1830) 1 Russ & M 178. As to waiver of a stipulation in a contract implied from conduct see *Plasticmoda SpA v Davidsons (Manchester) Ltd* [1952] 1 Lloyd's Rep 527, CA; *Lickiss v Milestone Motor Policies at Lloyds* [1966] 2 All ER 972; sub nom *Barrett Bros (Taxis) Ltd v Davies* [1966] 1 WLR 1334, CA; *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189, [1972] 2 All ER 127, CA; and see CONTRACT vol 9(1) (Reissue) PARA 1025 et seq. As to the waiver of a forfeiture or notice to quit see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 615 et seq; as to waiver in connection with bills of exchange see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1440, 1495, 1517, 1536; and as to waiver of a lien on shares see COMPANIES vol 15 (2009) PARA 1209.

12 *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189 at 213, [1972] 2 All ER 127 at 140, CA, per Lord Denning MR.

13 *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657 at 660, [1955] 1 WLR 761 at 764, HL, per Viscount Simonds; *John Burrows Ltd v Subsurface Surveys Ltd and Whitcomb* [1968] SCR 607, 68 DLR (2d) 354, Can SC.

14 *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657, [1955] 1 WLR 761, HL; *Ajayi (t/a Colony Carrier Co) v RT Briscoe (Nigeria) Ltd* [1964] 3 All ER 556, [1964] 1 WLR 1326, PC; *John Burrows Ltd v Subsurface Surveys Ltd and Whitcomb* [1968] SCR 607, 68 DLR (2d) 354, Can SC.

15 *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657, [1955] 1 WLR 761, HL; *Enrico Furst & Co v WE Fischer Ltd* [1960] 2 Lloyd's Rep 340; *Ajayi (t/a Colony Carrier Co) v RT Briscoe (Nigeria) Ltd* [1964] 3 All ER 556, [1964] 1 WLR 1326, PC.

16 *Ajayi (t/a Colony Carrier Co) v RT Briscoe (Nigeria) Ltd* [1964] 3 All ER 556, [1964] 1 WLR 1326, PC.

17 *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189, [1972] 2 All ER 127, CA.

18 *Hughes v Metropolitan Rly Co* (1877) 2 App Cas 439, HL; *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130; and see *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1954] 2 All ER 28, [1954] 1 WLR 862, CA (revsd on the question of the notice required to terminate the waiver [1955] 2 All ER 657, [1955] 1 WLR 761, HL); *Bremer Handelsgesellschaft mbH v Vanden Avenue-Izegem PVBA* [1978] 2 Lloyd's Rep 109, HL; *Bremer Handelsgesellschaft mbH v C Mackprang Jnr* [1979] 1 Lloyd's Rep 221, CA; *Reel v Holder* [1979] 3 All ER 1041, [1979] 1 WLR 1252; *Société Italo-Belge Pour le Commerce et l'Industrie SA v Palm Vegetable Oils (Malaysia) Sdn Bhd, The Post Chaser* [1982] 1 All ER 19; *Cerealmangimi SpA v Alfred C Toepfer, The Eurometal* [1981] 3 All ER 533; *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade* [1983] QB 529, [1983] 1 All ER 301, CA (affd on another point [1983] 2 AC 694, [1983] 2 All ER 763, HL); *Calder v H Kitson Vickers & Sons (Engineers) Ltd* [1988] ICR 232, CA; *Smith v Lawson* (1997) 75 P & CR 466, [1997] NPC 87, CA. See also *Avimex SA v Dewulf & Cie* [1979] 2 Lloyd's Rep 57; *Afovos Shipping Co SA v R Pagnan & F Lli, The Afovos* [1980] 2 Lloyd's Rep 469; *Ets Soules & Cie v International Trade Development Co Ltd* [1980] 1 Lloyd's Rep 129, CA; *Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 84, [1981] 3 All ER 577, CA; *Syros Shipping Co SA v Elaghill Trading Co, The Proodos C* [1981] 3 All ER 189, [1980] 2 Lloyd's Rep 390; *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 946-949 per Goff J (affd on other grounds [1982] 1 All ER 925, CA and HL); *Bremer Handelsgesellschaft mbH v Bunge Corp* [1983] 1 Lloyd's Rep 476, CA; *Drexel Burnham Lambert International NV v Mohamed Schaker Salim Abou El Nasr and Etablissement Abou Nasr el Bassatni* [1986] 1 Lloyd's Rep 356; *Goldsworthy v Brickell* [1987] Ch 378, [1987] 1 All ER 853, CA; *JT Sydenham v Enichem Elastomers Ltd* [1989] 1 EGLR 257; *Seechurn v Ace Insurance SA-NV (formerly Cigna Insurance Co of Europe SA-NV)* [2002] EWCA Civ 67, [2002] 2 Lloyd's Rep 390, [2002] All ER (D) 74 (Feb); and ESTOPPEL vol 16(2) (Reissue) PARA 1082 et seq.

19 'A waiver is nothing unless it amounts to a release. It is by a release, or something equivalent only, that an equitable demand can be given away. A mere waiver signifies nothing more than an expression of intention not to insist upon the right, which in equity will not without consideration bar the right any more than at law accord without satisfaction would be a plea': *Stackhouse v Barnston* (1805) 10 Ves 453 at 466 per Grant MR. Similarly, a promise not to enforce an accrued legal right, eg a right to seize goods under a bill of sale, is not binding unless there is consideration for it, or the debtor has altered his position: *Williams v Stern* (1879) 5 QBD 409, CA.

20 Thus, from the open use of premises for many years in violation of a restrictive covenant a waiver or release of the covenant will be presumed (*Hepworth v Pickles* [1900] 1 Ch 108); but a finding of waiver will not necessarily wholly destroy the covenant nor prevent a claim being brought in respect of future breaches (*Chelsea Estates Ltd v Kadri* (1970) 214 Estates Gazette 1356); and see *Lloyds Bank Ltd v Jones* [1955] 2 QB 298; sub nom *Re Lower Onibury Farm, Onibury, Shropshire, Lloyds Bank Ltd v Jones* [1955] 2 All ER 409, CA; *Taylor v Ellis* [1960] Ch 368, [1960] 1 All ER 549. A beneficiary who obtains part satisfaction of a breach of trust does not thereby waive his right to further relief: *Re Cross, Harston v Tenison* (1882) 20 ChD 109 at 122, CA.

21 *Ridge v Baldwin* [1964] AC 40, [1963] 2 All ER 66, HL.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/7. EQUITABLE DEFENCES/(2) RELEASE AND WAIVER/908. Knowledge of rights essential.

### 908. Knowledge of rights essential.

For a release<sup>1</sup> or waiver<sup>2</sup> to be effectual it is essential that the person granting it should be fully informed as to his rights<sup>3</sup>. This does not, however, prevent a person from deliberately, at any rate in a compromise agreement for valuable consideration, agreeing to release claims of which he is unaware and of which he could not be aware, even claims which could not on the facts known to the parties have been imagined, but to have this effect appropriate language must be used to make plain that that is the intention<sup>4</sup>. Similarly, a confirmation of an invalid transaction is inoperative unless the person confirming knows of its invalidity<sup>5</sup>.

1 *Pusey v Desbouvrie* (1734) 3 P Wms 315; *Ramsden v Hylton*, *Hylton v Biscoe* (1751) 2 Ves Sen 304; and see *M'Carthy v Decaix* (1831) 2 Russ & M 614.

2 *Vyvyan v Vyvyan* (1861) 30 Beav 65 (affd 4 De G & J 183); and see *Earl of Darnley v London, Chatham and Dover Rly Co (Proprietors etc)* (1867) LR 2 HL 43 at 57 per Lord Chelmsford LC ('a waiver must be an intentional act with knowledge'); *Moxon v Payne* (1873) 8 Ch App 881 at 885; *Federal Supply and Cold Storage Co of South Africa v Angehrn and Piel* (1910) 80 LJPC 1; *R v Essex Justices, ex p Perkins* [1927] 2 KB 475, DC; *Peyman v Lanjani* [1985] Ch 457, [1984] 3 All ER 703, CA.

3 The sentence in the text to this note was cited with apparent approval in *National Westminster Bank v Powney* (1989) 60 P & CR 420 at 444, CA, per Slade LJ. See also *Peyman v Lanjani* [1985] Ch 457, [1984] 3 All ER 703, CA (an effective election giving rise to a waiver may be made only with knowledge of the party's legal rights as well as the facts giving rise to the rights); cf *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp'n of India, The Kanchenjunga* [1990] 1 Lloyd's Rep 391, HL (not always necessary to decide what knowledge was required); and see *Stevens & Cutting Ltd v Anderson* [1990] 1 EGLR 95, CA.

4 *Bank of Credit and Commerce International SA (in liq) v Ali* [2001] UKHL 8 at [9], [2002] 1 AC 251, [2001] 1 All ER 961 per Lord Bingham of Cornhill; and see PARA 906 ante.

5 *Crowe v Ballard* (1790) 3 Bro CC 117; *Roche v O'Brien* (1810) 1 Ball & B 330; *Savery v King* (1856) 5 HL Cas 627.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/7. EQUITABLE DEFENCES/(3) ACQUIESCENCE/909. Acquiescence and estoppel.

### (3) ACQUIESCENCE

#### 909. Acquiescence and estoppel.

The term 'acquiescence' is used where a person refrains from seeking redress when there is brought to his notice a violation of his rights of which he did not know at the time; and in that sense acquiescence is an element in unconscionable delay ('laches')<sup>1</sup>. There may, however, be a case of acquiescence which does not depend on delay at all<sup>2</sup>. Subject thereto, a person whose rights have been infringed without any knowledge or assent on his part has vested in him a right of action which, as a general rule, cannot be divested without accord and satisfaction or deed of release<sup>3</sup>.

The term 'acquiescence' is, however, properly used where a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed; a person so standing by cannot afterwards be heard to complain of the act<sup>4</sup>. In that sense the doctrine of acquiescence may be defined as quiescence under such circumstances that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct<sup>5</sup>, the principle of estoppel by representation applying both at law and in equity, although its application to acquiescence is equitable<sup>6</sup>. The estoppel rests upon the circumstance that the person standing by in effect makes a misrepresentation as to a fact, namely, his own title; a mere statement that he intends to do something, for example to abandon his right, is not enough<sup>7</sup>. Furthermore, equitable estoppel is not applied in favour of a volunteer<sup>8</sup>.

The doctrine of acquiescence operating as an estoppel was founded on fraud<sup>9</sup>. As the estoppel is raised immediately by the conduct giving rise to it, lapse of time is of no importance; and for this reason the effect of acquiescence is expressly preserved by statute<sup>10</sup>.

1 See PARA 912 post. The notion expressed by Lord Wensleydale in *Archbold v Scully* (1861) 9 HL Cas 360 at 383 ('acquiescence in this sense means more than laches') is more easily comprehended on the basis that he was speaking of 'mere' or 'simple' laches ie undue delay on the part of the plaintiff in prosecuting his claim and no more. See *Goldsworthy v Brickell* [1987] Ch 378 at 410, [1987] 1 All ER 853 at 872, CA, per Nourse LJ. For a discussion on the distinction between acquiescence and laches see Brunyate's Limitation of Actions in Equity (1932) pp 188-190. As to acquiescence constituting ratification in cases of agency see AGENCY vol 1 (2008) PARA 68. As to acquiescence under the Hague Convention on the Civil Aspects of International Child Abduction 1980 art 13(a), as enacted by the Child Abduction and Custody Act 1985 s 1(2), Sch 1, see *Re H (abduction: acquiescence)* [1998] AC 72, [1997] 2 All ER 225, HL; and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 811.

2 *HP Bulmer Ltd v Showerings Ltd v J Bollinger SA and Champagne Lanson Père et Fils* [1978] RPC 79 at 134, 135, CA, per Goff LJ.

3 *De Bussche v Alt* (1878) 8 ChD 286; and see PARA 906 ante. There is, however, no fixed rule that ignorance of a legal right is a bar to acquiescence in a breach of trust; each case depends on its circumstances: *Holder v Holder* [1968] Ch 353 at 379, [1968] 1 All ER 665, CA; *Re Freeston's Charity* [1979] 1 All ER 51, [1978] 1 WLR 741, CA. 'Acquiescence may either be an entire bar to all relief, or it may be a ground for inducing the court to act under the powers of Lord Cairns' Act [the Chancery Amendment Act 1858]': *Sayers v Collyer* (1884) 28 ChD 103 at 110, CA, per Fry LJ. See also *Barker v O'Mahony* (12 July 1990, unreported), CA; and TRUSTS vol 48 (2007 Reissue) PARAS 1118-1119.

4 *Duke of Leeds v Earl of Amherst* (1846) 2 Ph 117 at 123 per Lord Cottenham LC; *De Bussche v Alt* (1878) 8 ChD 286 at 314; and see *Swain v Law Society*[1981] 3 All ER 797, [1982] 1 WLR 17, CA (revsd without discussion of this point [1983] 1 AC 598, [1982] 2 All ER 827, HL); *Shaw v Applegate*[1978] 1 All ER 123, [1977] 1 WLR 970, CA (no acquiescence where doubt as to whether covenantor's actions were a breach of covenant).

5 *De Bussche v Alt* (1878) 8 ChD 286 at 314. 'Whilst recognising that these two pleas [acquiescence and estoppel] are not necessarily coterminous, it yet seems to me that in the present case, if the facts are sufficient to create an estoppel, then a fortiori a plea of acquiescence must succeed': *Holder v Holder*[1968] Ch 353 at 403, [1968] 1 All ER 665 at 681, CA, per Sachs LJ. Cf *Kent v Jackson* (1851) 14 Beav 367 at 384-385; affd (1852) 2 De GM & G 49; and see *O'Connor v O'Connor* (1916) 50 ILT 103.

Acquiescence differs from estoppel in that for acquiescence it is not necessary that the person should have made any representation by words or conduct that he did not intend to enforce his rights: *Proctor v Bennis* (1887) 36 ChD 740 at 761, CA, per Bowen LJ.

As to proprietary estoppel see ESTOPPEL vol 16(2) (Reissue) PARA 1089 et seq.

6 *R v Buttertton Inhabitants* (1796) 6 Term Rep 554 at 556. The term 'estoppel by representation' has apparently been held to apply to estoppel only as a bar to a claim in equity: see *Evans v Bicknell* (1801) 6 Ves 174 at 182-183; *Burrowes v Lock* (1805) 10 Ves 470 at 475; *Low v Bouverie*[1891] 3 Ch 82 at 101, CA, per Lindley LJ; but see ESTOPPEL vol 16(2) (Reissue) PARA 1052 et seq.

7 *Jorden v Money* (1854) 5 HL Cas 185 at 214-215 per Lord Cranworth LC; *Citizens' Bank of Louisiana v First National Bank of New Orleans* (1873) LR 6 HL 352 at 360 per Lord Chelmsford LC.

8 *Lovett v Lovett*[1898] 1 Ch 82 at 88. As to equitable estoppel in specific performance see *Rudd v Lascelles*[1900] 1 Ch 815 at 818; and SPECIFIC PERFORMANCE.

9 *Willmott v Barber* (1880) 15 ChD 96 at 105-106; and see *Ward v Kirkland*[1967] Ch 194 at 238, [1966] 1 All ER 609 at 623 per Ungood-Thomas J; *Holder v Holder*[1968] Ch 353 at 394, [1968] 1 All ER 665 at 673, CA, per Harman LJ. It has thus been held that the doctrine is no less applicable when the person standing by is a minor: *Savage v Foster* (1723) 9 Mod Rep 35 at 37; *Mills v Fox* (1887) 37 ChD 153 at 167. Formerly, the rule applied no less when the person standing by was under coverture: *Savage v Foster* supra; 1 White & Tud L C (9th Edn) 416. Cf, however, the position where acquiescence is an element in laches: see PARA 912 the text and notes 6-7 post.

10 See the Limitation Act 1980 s 36(2); para 918 post; and LIMITATION PERIODS vol 68 (2008) PARAS 906, 919.



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/7. EQUITABLE DEFENCES/(4) UNCONSCIONABLE DELAY ('LACHES')/910. The defence of laches.

#### (4) UNCONSCIONABLE DELAY ('LACHES')

##### 910. The defence of laches.

A claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation<sup>1</sup> 'equity aids the vigilant, not the indolent' or 'delay defeats equities'<sup>2</sup>. A court of equity refuses its aid to stale demands, where the claimant has slept upon his right and acquiesced for a great length of time<sup>3</sup>. He is then said to be barred by his unconscionable delay ('laches')<sup>4</sup>. The defence of laches is, however, allowed only where there is no statutory bar<sup>5</sup>. If there is a statutory bar operating either expressly or by way of analogy, the claimant is entitled to the full statutory period before his claim becomes unenforceable<sup>6</sup>; and an injunction in aid of a legal right is not barred until the legal right is barred<sup>7</sup>, although laches may be a bar to an interim injunction<sup>8</sup>.

1 As to the limitation of civil claims see the Limitation Act 1980 (which replaces the former statutes of limitation); and LIMITATION PERIODS. See also *Joyce v Joyce*[1979] 1 All ER 175, [1978] 1 WLR 1170 (first of two actions (now generally known as 'claims': see CIVIL PROCEDURE vol 11 (2009) PARA 18) on same issue dismissed for want of prosecution where plaintiff (now known as 'claimant') failed to show that he could overcome the doctrine of laches in respect of the second action).

2 *le vigilantibus et non dormientibus lex succurrit*: see *Marquis of Cholmondeley v Lord Clinton* (1820) 2 Jac & W 1 at 140; *Cox v Morgan* (1801) 2 Bos & P 398 at 412 per Heath J. As to the effect of acquiescence in releasing land from restrictive covenants see PARA 629 ante.

3 *Smith v Clay* (1767) 3 Bro CC 639n per Lord Camden; *Pickering v Lord Stamford* (1793) 2 Ves 272 at 280. As to striking out a probate claim on the ground of delay see *Re Flynn, Flynn v Flynn*[1982] 1 All ER 882, [1982] 1 WLR 310.

4 The words 'laches' and 'acquiescence' are not uniformly used. Sometimes laches is taken to mean undue delay on the part of the claimant in prosecuting his claim and no more; sometimes acquiescence is used to mean laches in that sense; and sometimes laches is used to mean acquiescence in its proper sense, which involves a standing by so as to induce the other party to believe that the wrong is consented to: see *Goldworthy v Brickell*[1987] Ch 378 at 410, [1987] 1 All ER 853 at 872, CA, per Nourse LJ. As to acquiescence see PARA 909 ante.

5 *Archbold v Scully* (1861) 9 HL Cas 360 at 383 per Lord Wensleydale; *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co*[1961] 3 All ER 713 at 735, [1962] 1 WLR 86 at 115 per Wilberforce J; affd [1964] Ch 303 at 353, [1963] 3 All ER 1 at 20, CA.

6 *Archbold v Scully* (1861) 9 HL Cas 360 at 383 per Lord Wensleydale; *Rochdale Canal Co v King* (1851) 2 Sim NS 78 at 89; *Re Baker, Collins v Rhodes, Re Seaman, Rhodes v Wish*(1881) 20 ChD 230, CA; *Re Maddever, Three Towns Banking Co v Maddever*(1884) 27 ChD 523, CA; *Penny v Allen* (1857) 7 De GM & G 409 at 426; and see *Moors v Marriott*(1878) 7 ChD 543 at 546; *Re Birch, Roe v Birch*(1884) 27 ChD 622; cf *Eldridge v Knott* (1774) 1 Cowp 214. As to claims to property subject to an after-acquired property clause in a marriage settlement see *Pullan v Koe*[1913] 1 Ch 9.

7 *Fullwood v Fullwood*(1878) 9 ChD 176; cf *Cooper v Hubbuck* (1860) 30 Beav 160 at 167.

8 *Johnson v Wyatt* (1863) 2 De GJ & Sm 18. Laches may be such a bar especially where expenditure has been incurred by the defendant: *Birmingham Canal Co v Lloyd* (1812) 18 Ves 515; *Great Western Rly Co v Oxford, Worcester and Wolverhampton Rly Co* (1853) 3 De GM & G 341 at 359. As to the refusal to grant an injunction on the ground of delay and acquiescence see CIVIL PROCEDURE vol 11 (2009) PARAS 373-375.

This paragraph was cited and applied by Moller J in *Wham-O Manufacturing Co v Lincoln Industries Ltd*[1982] RPC 281 at 312-313, NZ HC.

**UPDATE**

**910 The defence of laches**

NOTE 4--See *Patel v Shah* [2005] 8 EG 190 (CS), CA.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/7. EQUITABLE DEFENCES/(4) UNCONSCIONABLE DELAY ('LACHES')/911. The nature of laches.

### 911. The nature of laches.

In enacting a statute of limitation the legislature specifies fixed periods after which claims are barred; equity does not, however, fix a specific limit, but considers the circumstances of each case<sup>1</sup>.

In determining whether there has been such delay as to amount to laches, the chief points to be considered are:

- 132 (1) acquiescence on the claimant's part; and
- 133 (2) any change of position that has occurred on the defendant's part.

Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it<sup>2</sup>. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches<sup>3</sup>.

The authorities must now be looked at in the light of recent judicial statements that the modern approach to laches or acquiescence does not require an exhaustive inquiry into whether the circumstances could fit within the principles established in previous cases; a broader approach should be adopted, namely whether it is unconscionable for the party concerned to be permitted to assert his beneficial rights<sup>4</sup>.

1 *Smith v Clay* (1767) 3 Bro CC 639n.

2 See and cf para 909 ante; and see PARA 912 post.

3 'Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy': *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 at 239; and see *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 at 1279, HL, per Lord Blackburn; *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co v Sharpe* [1892] 1 Ch 154 at 168, CA; *Rochefoucauld v Boustead* [1897] 1 Ch 196 at 210, CA; *Re Gallard, ex p Gallard* [1897] 2 QB 8 at 15; *Agbeyegbe v Ikomi* [1953] 1 WLR 263 at 266-267, PC; *Nwakobi v Nzekwu* [1964] 1 WLR 1019 at 1025, PC (approving the description given of the defence of laches in *Lindsay Petroleum Co v Hurd* supra); *Re Jermyn Street Turkish Baths Ltd* [1970] 3 All ER 57, [1970] 1 WLR 1194 (revsd [1971] 3 All ER 184, [1971] 1 WLR 1042, CA); *Re Bailey, Hay & Co Ltd* [1971] 3 All ER 693 at 702, [1971] 1 WLR 1357 at 1367; *Gorthon Invest AB v Ford Motor Co Ltd, The Maria Gorthon* [1976] 2 Lloyd's Rep 720; *British Leyland Motor Corp Ltd v Armstrong Patents Co Ltd* [1982] FSR 481 (affd [1986] RPC 279, CA; revsd without discussion of this point [1986] AC 577, [1986] 1 All ER 850, HL); *Nelson v Rye* [1996] 2 All ER 186, [1996] 1 WLR 1378 (said, however, to be wrongly decided on the Limitation Act 1980 point by Millett LJ in *Paragon Finance plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400 at 416, CA; and disapproved in *Coulthard v Disco Mix Club Ltd* [1999] 2 All ER 457, [2000] 1 WLR 707). See also the doctrine of laches discussed in *Weld v Petre* [1929] 1 Ch 33, CA; and see *Anchor Trust Co v Bell* [1926] Ch 805. Laches is not imputable to the Crown or to the Attorney General suing on behalf of the public (*A-G v Proprietors of the Bradford Canal* (1866) LR 2 Eq 71), except in an injunction case (*A-G v Sheffield Gas Consumers Co* (1853) 3 De GM & G 304). As to the defence of laches in proceedings against an express trustee who is still the legal owner of the trust property, and who holds the land on a trust for the benefit of the public, see *Brisbane City Council v A-G for Queensland* [1979] AC 411, [1978] 3 All ER 30, PC.

The text and notes 1-3 supra were cited and applied by Moller J in *Wham-O Manufacturing Co v Lincoln Industries Ltd* [1982] RPC 281 at 31-313, NZ HC; and by Balcombe J in *Butlin-Sanders v Butlin* [1985] FLR 204 at 213.

4 *Frawley v Neill* (1999) Times, 5 April, 143 Sol Jo LB 98, CA, applied in *JJ Harrison (Properties) Ltd v Harrison* [2001] 1 BCLC 158 at 174, [2000] All ER (D) 2001 (para 61); affd [2001] EWCA Civ 1467, [2002] 1 BCLC 162, [2001] All ER (D) 160 (Oct).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/7. EQUITABLE DEFENCES/(4) UNCONSCIONABLE DELAY ('LACHES')/912. Acquiescence as an element in laches.

## 912. Acquiescence as an element in laches.

The chief element in laches is acquiescence, and sometimes this has been described as the sole ground for creating a bar in equity by the lapse of time<sup>1</sup>. Acquiescence implies that the person acquiescing is aware of his rights and is in a position to complain of an infringement of them<sup>2</sup>.

Hence acquiescence depends on knowledge, capacity and freedom. As regards knowledge, persons cannot be said to acquiesce in the claims of others unless they are fully cognisant of their right to dispute those claims<sup>3</sup>. Where a claimant is kept in ignorance of his cause of action through the defendant's fraud, time begins to run only from the time when the claimant discovers the truth or ought reasonably to have done so<sup>4</sup>. It is not necessary, however, that the claimant should have known the exact relief to which he was entitled; it is enough that he knew the facts constituting his title to relief<sup>5</sup>. As regards capacity, laches is not imputed while the party is a minor<sup>6</sup> or is mentally disordered<sup>7</sup>. As regards freedom, a person does not acquiesce while he is subject to such circumstances of undue influence or other pressure as to deprive him of the ability to give a true consent, and laches is not imputed until he is released from the position in which he is placed by these circumstances<sup>8</sup>.

Poverty, added to other circumstances, is a material ingredient in deciding whether laches is to be imputed to a vendor who seeks to avoid a sale, but by itself it does not prevent a waiver of a right<sup>9</sup>. A remainderman may assent to a breach of trust while his interest is still future, and he will then be debarred from complaining of it; but ordinarily he is not bound to enforce his rights, and delay does not prejudice him until after his interest has fallen into possession<sup>10</sup>. Moreover, there is no laches until the person entitled is ascertained<sup>11</sup>.

1 'Length of time, where it does not operate as a statutory or positive bar, operates, as I apprehend, simply as evidence of assent or acquiescence': *Life Association of Scotland v Siddal, Cooper v Greene* (1861) 3 De GF & J 58 at 72 per Turner LJ; cf *Morse v Royal* (1806) 12 Ves 355 at 374. See, also, in the context of acquiescence in the removal of children from one jurisdiction to another, *Re H (minors) (abduction: acquiescence)* [1998] AC 72, [1997] 2 All ER 225, HL. This paragraph was cited in *T v T (consent order: procedure to set aside)* [1997] 1 FCR 282, [1996] 2 FLR 640.

2 From the difficulty of concerted action, laches is less readily imputed to a class than to an individual: *A-G v Proprietors of the Bradford Canal* (1866) LR 2 Eq 71 at 82; *Evans v Smallcombe* (1868) LR 3 HL 249 at 259; *Boswell v Coaks* (1884) 27 ChD 424 at 457, CA; revsd upon the evidence sub nom *Coaks v Boswell* (1886) 11 App Cas 232, HL. As to acquiescence by shareholders in acts ultra vires the directors see *London Financial Association v Kelk* (1884) 26 ChD 107 at 152; *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co v Sharpe* [1892] 1 Ch 154, CA; and COMPANIES vol 14 (2009) PARA 278; but as to the partial abolition of the doctrine of ultra vires see PARA 774 ante.

The text to notes 1-2 supra was cited and applied by Moller J in *Wham-O Manufacturing Co v Lincoln Industries Ltd* [1982] RPC 281 at 312-313, NZ HC.

3 *Marker v Marker* (1851) 9 Hare 1 at 16; *Burrows v Walls* (1855) 5 De GM & G 233; *Earl Beauchamp v Winn* (1873) LR 6 HL 223 at 249; *La Banque Jacques-Cartier v La Banque d'Epargne de la Cité et du District de Montreal* (1887) 13 App Cas 111 at 118, PC; *Rees v De Bernardy* [1896] 2 Ch 437 at 445; *Great Northern Ry Co v Bradford Corpn* (1918) 88 LJ Ch 101. Under the statutes of limitation, ignorance did not prevent the running of the statute (*Rains v Buxton* (1880) 14 ChD 537; cf *Adnam v Earl of Sandwich* (1877) 2 QBD 485 at 490; *Irish Land Commission v White* [1896] 2 IR 410), save in the case of fraud (*Gibbs v Guild* (1882) 9 QBD 59, CA).

4 *Gibbs v Guild* (1882) 9 QBD 59, CA; *Legh v Legh* (1930) 143 LT 151. This equitable doctrine relating to the running of time where the right of action is concealed by the defendant is embodied in the Limitation Act 1980 s 32 (as amended): see LIMITATION PERIODS vol 68 (2008) PARA 1220 et seq.

5 See *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 at 241. In order to found a defence of acquiescence, however, the party against whom the plea is raised must ordinarily know not only the facts on which his rights depend, but also the consequences in point of law (*Cockerell v Cholmeley* (1830) 1 Russ & M 418 at 425; *Re Howlett, Howlett v Howlett* [1949] Ch 767 at 775, [1949] 2 All ER 490 at 492-493); although, in general, when the facts are known from which a right arises, the right is presumed to be known (*Stafford v Stafford* (1857) 1 De G & J 193 at 202); and see *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co* [1961] 3 All ER 713 at 729-730, [1962] 1 WLR 86 at 107-108 (breach of trust case; authorities reviewed on what is involved in 'knowing the circumstances'; no opinion expressed on this point on appeal [1964] Ch 303 at 339, [1963] 3 All ER 1 at 11, CA); *Holder v Holder* [1968] Ch 353 at 379, [1968] 1 All ER 665, CA (no hard and fast rule, at least in cases of breach of trust). If he has been mistaken as to his rights, he is not guilty of laches until he has discovered the mistake, or has had reasonable means of doing so: *Brooksbank v Smith* (1836) 2 Y & C Ex 58; *Baker v Courage & Co* [1910] 1 KB 56; and see *Stone v Godfrey* (1854) 5 De GM & G 76.

6 As to when a party is a minor see PARA 709 note 1 ante.

7 *March v Russell* (1837) 3 My & Cr 31; *Young v Harris* (1891) 65 LT 45; and see *Watson v Toone* (1820) 6 Madd 153. Cf, however para 909 note 9 ante.

8 *Aylward v Kearney* (1814) 2 Ball & B 463 at 477; *Gregory v Gregory* (1815) Coop G 201 (affd (1821) Jac 631); *Roberts v Tunstall* (1845) 4 Hare 257; *Allcard v Skinner* (1887) 36 ChD 145 at 163, CA; and see *Purcell v McNamara* (1806) 14 Ves 91; cf *Dunbar v Tredennick* (1813) 2 Ball & B 304 at 317; *Gowland v De Faria* (1810) 17 Ves 20.

9 *Roberts v Tunstall* (1845) 4 Hare 257.

10 *Life Association of Scotland v Siddal, Cooper v Greene* (1861) 3 De GF & J 58 at 73; *Price v Blackmore* (1843) 6 Beav 507; *Kirwan v Kennedy* (1869) IR 3 Eq 472 at 484; *Bennett v Colley* (1833) 2 My & K 225; *Mehrtens v Andrews* (1839) 3 Beav 72; and see *Butler v Carter* (1868) LR 5 Eq 276. The omission of the remainderman to take steps to have the fund secured may, however, bar him: see *Re Taylor, Atkinson v Lord* (1900) 81 LT 812.

11 *Cator v Croydon Canal Co* (1841) 4 Y & C Ex 405; affd on appeal (1843) 4 Y & C Ex 593.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/7. EQUITABLE DEFENCES/(4) UNCONSCIONABLE DELAY ('LACHES')/913. Laches in cases of fraud.

### 913. Laches in cases of fraud.

Where the equitable remedy is in respect of fraud, there is no laches so long as the party defrauded remains, without any fault of his own, in ignorance of the fraud<sup>1</sup>; and a person who is entitled to rely on the fidelity of another is not bound to inquire as to the other's conduct until he has reason for suspicion<sup>2</sup>. Fraud is not condoned unless the injured party has full knowledge of all the facts and of the equitable rights arising out of those facts<sup>3</sup>. When the fraud has been discovered, however, relief must be sought promptly<sup>4</sup>; even in cases of gross fraud it may not be granted after a great lapse of time against innocent persons claiming under the fraudulent person<sup>5</sup>.

1 *Rolfe v Gregory* (1865) 4 De GJ & Sm 576 at 579; *Roche v O'Brien* (1810) 1 Ball & B 330; and see *Marquis of Clanricarde v Henning* (1861) 30 Beav 175 at 180 per Romilly MR ('the fraud is considered to be discovered at the time when such reasonable notice of what has happened has been given to the person injured as to make it his duty, if he intends to seek redress, to make inquiry and to ascertain the circumstances of the case'); *Browne v McClintock* (1873) LR 6 HL 434 at 456. As to secret working of mines see *Bulli Coal Mining Co v Osborne* [1899] AC 351, PC; *Ecclesiastical Comrs for England v North Eastern Rly Co* (1877) 4 ChD 845; and see LIMITATION PERIODS vol 68 (2008) PARAS 1224-1225; MINES, MINERALS AND QUARRIES. As to reopening accounts on the ground of fraud recently discovered see *Vernon v Vawdry* (1740) 2 Atk 119; *Allfrey v Allfrey* (1849) 1 Mac & G 87; and PARAS 453-454 ante.

2 *Rawlins v Wickham* (1858) 3 De G & J 304; *Betjemann v Betjemann* [1895] 2 Ch 474, CA.

3 *Moxon v Payne* (1873) 8 Ch App 881 at 885. The text to this note was cited in *T v T (consent order: procedure to set aside)* [1997] 1 FCR 282, [1996] 2 FLR 640.

4 See *Byrne v Frere* (1828) 2 Mol 157.

5 *Hercy v Dinwoody* (1793) 2 Ves 87 at 92.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/7. EQUITABLE DEFENCES/(4) UNCONSCIONABLE DELAY ('LACHES')/914. Change in defendant's position.

## **914. Change in defendant's position.**

Regard must be had to any change in the defendant's position which has resulted from the claimant's delay in bringing his claim. This may be, for example, because by the lapse of time he has lost the evidence necessary for meeting the claim. A court of equity will not allow a dormant claim to be set up when the means of resisting it, if it turns out to be unfounded, have perished<sup>1</sup>. Where the claim is to set aside a conveyance of property, the defendant may have settled his mode of living upon the assumption that the conveyance was valid<sup>2</sup>. The fact that property has passed through various hands, and that money has been expended on it, is a strong reason for not setting aside an improper sale by a trustee<sup>3</sup>. Any change in the defendant's position tells more strongly against the claimant if the claimant has been acquainted with the circumstance so as to make it inequitable for him to remain inactive<sup>4</sup>. Laches will be imputed where the claimant, with knowledge of his rights, has allowed the defendant to expend money in the belief that no claim will be made<sup>5</sup>.

1 *Bright v Legerton* (1861) 2 De GF & J 606 at 617, CA, per Lord Campbell LC; and see *Mathew v Brise* (1851) 14 Beav 341 at 346; *Watt v Assets Co* [1905] AC 317 at 329, 333, HL; *Miller's Executrix v Miller's Trustees* 1922 SC 150 (where, however, time was not a bar). As to cases of fraud see *Charter v Trevelyan* (1844) 11 Cl & Fin 714 at 740, HL; and MISREPRESENTATION AND FRAUD.

2 *Turner v Collins* (1871) 7 Ch App 329; *Allcard v Skinner* (1887) 36 ChD 145 at 192, CA.

3 *Bonney v Ridgard* (1784) 1 Cox Eq Cas 145. If there has been no alteration in the position of the parties, mere delay does not amount to laches so as to prevent proceedings to contest the validity of a will: *Williams v Evans* [1911] P 175.

4 *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 at 1279, HL.

5 See *Evans v Smallcombe* (1868) LR 3 HL 249 at 255.

## **UPDATE**

### **914 Change in defendant's position**

NOTE 4--See *Fisher v Brooker* [2009] UKHL 41, [2009] 4 All ER 789 (defendants unable to demonstrate acts during course of delay period that would have resulted in balance of justice justifying refusal of relief to which claimant entitled).



Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/7. EQUITABLE DEFENCES/(4) UNCONSCIONABLE DELAY ('LACHES')/915. Staleness of demand as a defence.

## 915. Staleness of demand as a defence.

Staleness of demand, as distinguished from a statute of limitation and analogy to it, may furnish a defence<sup>1</sup>. A defence based on this ground renders it necessary to consider the time which has elapsed and the balance of justice or injustice in affording or refusing relief<sup>2</sup>. In such a case whether laches arises depends on the negligence of the claimant to enforce his rights<sup>3</sup>. Mere delay would not appear to be sufficient to bar a claim<sup>4</sup>; but, generally, in the absence of minority or some circumstance preventing a claim, a claim will be treated as barred after a lapse of 20 years<sup>5</sup>.

Time is no bar in certain cases of breach of trust<sup>6</sup>, although, where there is no statutory bar, a claim for breach of trust, like any other equitable claim, may be barred by acquiescence, whether this consists in assent to the breach of trust or in subsequent condonation<sup>7</sup>, or by other circumstances which, combined with delay, make it inequitable to allow the claim<sup>8</sup>. Time alone is not a bar to a mortgagor's right to redeem personalty, and equity will not deprive him of this right provided that, when it is asserted, the debt has been or can be paid, the security is available and no one's position has been altered in the meantime<sup>9</sup>.

1 *Smith v Clay* (1967) 3 Bro CC 639n; *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co v Sharpe* [1892] 1 Ch 154 at 168, CA; *Brooks v Muckleston* [1909] 2 Ch 519 at 522-523.

2 *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co v Sharpe* [1892] 1 Ch 154 at 168, CA. See *Frawley v Neill* (1999) Times, 5 April, 143 Sol Jo LB 98, CA; and PARA 911 ante.

3 *Harcourt v White* (1860) 28 Beav 303 at 310 per Romilly MR; *Williams v Thomas* [1909] 1 Ch 713 at 722, CA; and see eg *Lynch v James Lynch & Sons (Transport) Ltd* [2000] All ER (D) 300, CA (dispute concerning shares in a family company; relevant events occurring between 19 and 37 years prior to commencement of proceedings; claimant offered no explanation for delay in asserting his rights; held that it would have been manifestly unjust to afford him equitable relief).

4 See *Electrolux Ltd v Electrix Ltd* (1953) 71 RPC 23, CA. In *Pickering v Lord Stamford* (1795) 2 Ves 581 at 582, Harden MR said that there was no such thing as setting up length of time against an equitable demand as a complete bar, and, at the instance of a next of kin, declared a charitable bequest void after 35 years. As to lapse of time constituting a bar see, however, *Harcourt v White* (1860) 28 Beav 303 at 310 per Romilly MR. Inordinate delay by itself may defeat a claim to equitable relief: *HP Bulmer Ltd and Showerings Ltd v J Bollinger SA and Champagne Lanson Père et Fils* [1978] RPC 79 at 135, CA, per Goff LJ.

5 *Byrne v Frere* (1828) 2 Mol 157 at 176 per Hart LC; and see *Blake v Gale* (1885) 31 ChD 196 at 210; affd (1886) 32 ChD 571, CA; *Hercy v Dinwoody* (1793) 2 Ves 87 (creditor's bill dismissed after 33 years). In certain cases (see PARA 917 post) special promptitude is required, and a much shorter period than 20 years will be a bar. In claims affecting land 12 years may be a bar (*Williams v Thomas* [1909] 1 Ch 713 at 722, CA), although this seems to be a case of applying the analogy of the statutes of limitation (see PARAS 919-920 post). As to a claim by a ward against his guardian see *Sleeman v Wilson* (1871) LR 13 Eq 36.

6 No period of limitation prescribed by the Limitation Act 1980 applies to an action (now known as a 'claim': see CIVIL PROCEDURE vol 11 (2009) PARA 18) by a beneficiary under a trust, being an action in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy or to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee or previously received by the trustee and converted to his use: s 21(1). In a case of fraud this may apply to a claim against a recipient from the trustee other than a recipient in good faith and for value without notice of the fraud: *GL Baker Ltd v Medway Building and Supplies Ltd* [1958] 2 All ER 532, [1958] 1 WLR 1216 (revsd on other grounds [1958] 3 All ER 540, [1958] 1 WLR 1216 at 1225, CA); *Eddis v Chichester Constable* [1969] 2 Ch 345, [1969] 2 All ER 912, CA; *DEG-Deutsche Investitions und Entwicklungsgesellschaft mbH v Koshy* [2002] 1 BCLC 478, [2001] All ER (D) 389 (Oct) (a claim for an account of profits, involving the deliberate non-disclosure of an interest which was part of a dishonest breach of trust involving the misapplication of company assets, came within the Limitation Act 1980 s

21(1)(b)). In other cases of breach of trust, where there is no period of limitation prescribed by any other provision of the Limitation Act 1980, the limitation period is six years: see s 21(3); and LIMITATION PERIODS vol 68 (2008) PARA 1143. Before the Limitation Act 1888 (repealed) came into force in 1890 a claim against an express trustee was never barred by lapse of time. So far as constructive trusts are concerned there are two distinct categories of constructive trust. The first category is where the constructive trustee, although not expressly appointed as a trustee, has assumed the duties of a trustee before the events which are alleged to constitute the breach of trust. Before 1890 this category of constructive trust was treated in the same way as an express trust and often confusingly described as such. The other category of constructive trust is the remedial constructive trust which is not in reality a trust at all, but merely a remedial mechanism by which equity gives relief for fraud. Before 1890 the former Court of Chancery gave effect to the reality of the situation by applying the statutes of limitation by analogy to the fraud which gave rise to the defendant's liability. The definitions of 'trust' and 'trustee' in the 1980 Act are not materially different from those in the 1888 Act. Though read literally and without regard to the evident purpose of the Act it might be thought that the statutory definitions abolish the difference between the two categories of constructive trust it can now be regarded as settled that this is not so and that the Limitation Act 1980 applies in the case of a remedial constructive trust: *Taylor v Davies* [1920] AC 636, PC; *Paragon Finance plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400, CA; *Cia de Seguros Imperio (a body corporate) v Heath (REBX) Ltd (formerly CE Heath & Co (North America) Ltd)* [2000] 2 All ER (Comm) 787, [2001] 1 WLR 112, CA. As to the former Court of Chancery see PARAS 401-403 ante.

As to amendments to a statement of case alleging intentional breaches of fiduciary duty and/or intentional breaches of trust which involve the addition or substitution of fresh causes of action see *Paragon Finance plc v DB Thakerar & Co (a firm)* supra; *Mortgage Corp v Alexander Johnson (a firm)* (1999) Times, 22 September; and see generally CIVIL PROCEDURE.

7 As to acquiescence being a bar to a beneficiary see *Brice v Stokes* (1805) 11 Ves 319; *Walker v Symonds* (1818) 3 Swan 1 at 64; *Re Gloucester, Aberystwith and South Wales Rly Co, Maitland's Case* (1853) 4 De GM & G 769 at 779; *Burrows v Walls* (1855) 5 De GM & G 233 at 251; *Farrant v Blanchford* (1863) 1 De GJ & Sm 107; *Fletcher v Collis* [1905] 2 Ch 24, CA; *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co* [1961] 3 All ER 713 at 729-730, [1962] 1 WLR 86 at 107-108 per Wilberforce J (no opinion expressed on this point on appeal [1964] Ch 303 at 339, [1963] 3 All ER 1 at 11, CA); *Holder v Holder* [1968] Ch 353 at 379, [1968] 1 All ER 665 at 673, CA (approving the conclusion of Wilberforce J in *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co* supra). See PARA 912 the text and note 5 ante.

8 *Harcourt v White* (1860) 28 Beav 303 at 310; *McDonnell v White* (1865) 11 HL Cas 570; *Carey v Cuthbert* (1873) IR 7 Eq 542; affd (1875) IR 9 Eq 330; *Re Cross, Harston v Tenison* (1882) 20 ChD 109, CA; *Re Taylor, Atkinson v Lord* (1900) 81 LT 812.

9 *Weld v Petre* [1929] 1 Ch 33, CA (redemption allowed after 26 years); and see PARA 920 note 4 post.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/7. EQUITABLE DEFENCES/(4) UNCONSCIONABLE DELAY ('LACHES')/916. Application of doctrine of laches.

## 916. Application of doctrine of laches.

The practical application of the doctrine of laches depends upon the nature of the claim which it is sought to enforce. In ordinary cases of claims to enforce equitable rights<sup>1</sup>, where it is not a case where staleness of demand would operate as a defence, the court looks for evidence of the circumstances which constitute laches, namely acquiescence by the claimant or change of position on the part of the defendant; and the claimant is not barred unless such evidence is given<sup>2</sup>. This applies to claims against trustees and others in a fiduciary position to set aside sales<sup>3</sup>, to claims to set aside a sale of a reversion<sup>4</sup> or a sale by a mortgagee<sup>5</sup>, to claims by mortgagees<sup>6</sup> or a beneficiary<sup>7</sup> to follow assets, and to claims in respect of partnership interests<sup>8</sup>. It applies generally to claims in respect of breach of trust, subject, however, to the rule that time itself is no bar, in other words is not evidence of acquiescence<sup>9</sup>.

1 In connection with a claim to enforce an interest in a partnership, Lord Chelmsford LC in *Clarke and Chapman v Hart* (1858) 6 HL Cas 633 divided equitable interests into 'executed' and 'executory', and treated the doctrine of laches as being confined to the latter class; executed interests, he said, could be lost only by conduct amounting to waiver. It is well settled, however, that the doctrine of laches applies to all equitable claims, including claims for breaches of trust, which are the most important class of claims in respect of executed interests, and Lord Chelmsford's restriction of the doctrine of laches has not been adopted. The distinction which he really intended, perhaps, was between claims of the nature considered in PARA 910 et seq ante (where, in the absence of actual acquiescence, the claimant may not be barred for a considerable time) and claims of the nature considered in PARA 917 post (where the claim must be made promptly and even a slight delay may be treated as laches).

2 See *Earl of Pomfret v Lord Windsor* (1752) 2 Ves Sen 472 at 482; *Stone v Godfrey* (1854) 5 De GM & G 76; *Frawley v Neill* (1999) Times, 5 April, 143 Sol Jo LB 98, CA; and PARA 911 ante.

3 As to purchases by trustees see *Hall v Noyes* (circa 1796), cited in *Whichote v Lawrence* (1798) 3 Ves 740 at 748; *Morse v Royal* (1806) 12 Ves 355 at 374; *Gregory v Gregory* (1815) Coop G 201; *Watson v Toone* (1820) 6 Madd 153; *Roberts v Tunstall* (1845) 4 Hare 257; *Baker v Read* (1854) 18 Beav 398; *Beningfield v Baxter* (1886) 12 App Cas 167, PC. As to purchase by a solicitor from his client see *Champion v Rugby* (1840) 9 LJ Ch 211; *Gresley v Mousley* (1858) 1 Giff 450 (on appeal (1859) 4 De G & J 78); and see *Ernest v Vivian* (1863) 33 LJ Ch 513.

4 *Moth v Atwood* (1801) 5 Ves 845; *Sibbering v Earl of Balcarras* (1850) 3 De G & Sm 735. Where, upon a sale of a reversion, the circumstances are such as to entitle the vendor to set it aside, it has been held that there is no laches until the reversion falls into possession: *Salter v Bradshaw*, *Bradshaw v Salter* (1858) 26 Beav 161; *Beynon v Cook* (1875) 10 Ch App 389 at 393n. It is apprehended, however, that, if this were many years after the sale, the vendor could not rely on further time, but would then have to apply for relief promptly: see *Salter v Bradshaw*, *Bradshaw v Salter* supra.

5 *Robertson v Norris* (1857) 1 Giff 421 (affd (1858) 4 Jur NS 443); *Pooley's Trustee v Whetham* (1886) 33 ChD 111 at 123, CA; *Nutt v Easton* [1899] 1 Ch 873 (affd [1900] 1 Ch 29, CA); and see *Martinson v Clowes* (1882) 21 ChD 857; on appeal (1885) 52 LT 706, CA.

6 *Ridgway v Newstead* (1861) 3 De GF & J 474; *Blake v Gale* (1886) 32 ChD 571 at 580, CA; cf *Leahy v De Moleyns* [1896] 1 IR 206, CA; *Re Lacy*, *Howard v Lightfoot* [1907] 1 Ch 330, CA. Delay alone is not, however, sufficient to prevent a creditor from asserting his right: *Re Eustace*, *Lee v McMillan* [1912] 1 Ch 561.

7 *Harris v Harris (No 2)* (1861) 29 Beav 110; and see *Bate v Hooper* (1855) 5 De GM & G 338.

8 Claims in respect of partnership interests are subject to the consideration that the claimant must not wait to see whether the partnership business will result in a profit or a loss. Hence, if a partner has received notice of forfeiture of his interest and does not object, he will be held to have acquiesced after the lapse of a short time (*Prendergast v Turton* (1841) 1 Y & C Ch Cas 98; on appeal (1843) 13 LJ Ch 268; *Rule v Jewell* (1881) 18 ChD

660; *Palmer v Moore* [1900] AC 293, PC); but it is otherwise where he objects and the delay is not excessive (*Clarke and Chapman v Hart* (1858) 6 HL Cas 633; *Garden Gully United Quartz Mining Co v McLister* (1875) 1 App Cas 39, PC).

9 *Life Association of Scotland v Siddal, Cooper v Greene* (1861) 3 De GF & J 58 at 72; *Harcourt v White* (1860) 28 Beav 303 at 310; *McDonnell v White* (1865) 11 HL Cas 570 at 579; *Jones v Higgins* (1866) LR 2 Eq 538; *Re Taylor, Atkinson v Lord* (1900) 81 LT 812. A tenant for life is not necessarily prejudiced by delay in asserting his right of recoupment of deficiency of income out of an existing fund: see *Mills v Drewitt* (1855) 20 Beav 632. As to the plea of mora (delay) in Scottish law see *Schulze v Tod* [1913] AC 213, HL.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/7. EQUITABLE DEFENCES/(4) UNCONSCIONABLE DELAY ('LACHES')/917. Cases where special promptitude is required.

### 917. Cases where special promptitude is required.

In certain classes of claims a stricter rule prevails and the claim to relief in equity must be made with special promptitude. These are claims to establish constructive trusts, to set aside gifts made under undue influence, and to obtain specific performance or rescission of contracts.

In cases of constructive trusts, relief which would have been given originally will be refused after long acquiescence<sup>1</sup>; the equity must be pursued within some reasonable time<sup>2</sup>. This is especially the case where the claim is to establish a trust in respect of property of a speculative nature<sup>3</sup>.

In the case of gifts made under undue influence, there is no laches in the donor until he is acquainted with his rights and the influence is at an end<sup>4</sup>; but, as soon as he is in this position, he must assert his equitable claim to have the gift set aside promptly in order that the persons affected may know what line of conduct they are to adopt with regard to the transaction<sup>5</sup>.

In claims for specific performance and for rescission of contracts, the special relief in equity is given only on condition that the claimant comes with great promptitude. Specific performance is relief which the court will not give except in cases where the parties seeking it come promptly, as soon as the nature of the case will admit<sup>6</sup>. According to the older authorities, any substantial delay after the negotiations have terminated, such as a year or probably less, will be a bar<sup>7</sup>; but the modern view has been said to be that, if between the claimant and defendant it is just that the claimant should obtain the remedy, the court ought not to withhold it merely because the claimant has been guilty of delay<sup>8</sup>. Laches will not, moreover, defeat a claim nearly so soon, if at all, where the claimant is in possession and is the equitable owner, and the claim is brought merely to clothe the claimant with the legal estate<sup>9</sup>. In cases of rescission the defendant may be altering his position in the belief that the contract is to stand, and the claim to rescind must be made promptly<sup>10</sup>, especially in the case of a contract to take shares<sup>11</sup>.

1 *Beckford v Wade* (1805) 17 Ves 87 at 97, PC.

2 *Townshend v Townshend* (1783) 1 Bro CC 550 at 554.

3 *Clegg v Edmondson* (1857) 8 De GM & G 787; *Clements v Hall* (1858) 2 De G & J 173; *Senhouse v Christian* (undated), cited in *Norway v Rowe* (1812) 19 Ves 144 at 159; *Norway v Rowe* supra; *Re Jarvis, Edge v Jarvis* [1958] 2 All ER 336, [1958] 1 WLR 815 (profits of a retail business). See, however, *Turner v Trelawny* (1841) 12 Sim 49 (trust of mining property established notwithstanding the lapse of 15 years and large expenditure on the mines).

4 *Allcard v Skinner* (1887) 36 ChD 145 at 163, CA.

5 *Turner v Collins* (1871) 7 Ch App 329. For examples see *Wright v Vanderplank* (1856) 8 De GM & G 133; *Mitchell v Homfray* (1881) 8 QBD 587, CA; *Allcard v Skinner* (1887) 36 ChD 145, CA. In *Hatch v Hatch* (1804) 9 Ves 292 a gift was set aside after 20 years, but the circumstances were special and the decision was an extreme one; and see *Turner v Collins* supra; *Byrne v Frere* (1828) 2 Mol 157. In *Bullock v Lloyds Bank Ltd* [1955] Ch 317, [1954] 3 All ER 726, a settlement by a young unmarried woman of the whole of her fortune was set aside after she had been aware of the objections to its validity for over four years (see at 327 and at 730-731).

6 *Eads v Williams* (1854) 4 De GM & G 674; *Pollard v Clayton* (1855) 1 K & J 462; *Re Oriental Steam Navigation Co, ex p Briggs* (1861) 4 De GF & J 191; *Barclay v Messenger* (1874) 43 LJ Ch 449 at 456; and see *Moore v Marrable* (1866) 1 Ch App 217; and SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARAS 902-904.

7 *Watson v Reid* (1830) 1 Russ & M 236; *Southcomb v Bishop of Exeter* (1847) 6 Hare 213; and see *Marquis of Hertford v Boore* (1801) 5 Ves 719 (14 months not a bar); *Harrington v Wheeler* (1799) 4 Ves 686 (six years a bar); *Milward v Earl of Thanet* (1801) 5 Ves 720n (seven years a bar). Delay in proceeding to trial after the issue of a claim form (formerly a writ) will not be a bar unless a clear case is made out that the claimant has led the defendant to believe that the claimant will seek damages and not specific performance: *Du Sautoy v Symes* [1967] Ch 1146 at 1168, [1967] 1 All ER 25 at 37-38 per Cross J. The purchaser of a reversion cannot wait until the reversion falls in before enforcing his contract: *Levy v Stogdon* [1899] 1 Ch 5, CA.

8 *Lazard Bros & Co Ltd v Fairfield Properties Co (Mayfair) Ltd* (1977) 121 Sol Jo 793 at 793 per Megarry V-C (specific performance is not to be regarded 'as a prize, to be awarded by equity to the zealous and denied to the indolent').

9 See *Clarke v Moore* (1844) 1 Jo & Lat 723 at 727; *Sharp v Milligan* (1856) 22 Beav 606 (specific performance of an agreement for a lease after 18 years' delay); *Shepherd v Walker* (1875) LR 20 Eq 659; *Williams v Greatrex* [1956] 3 All ER 705, [1957] 1 WLR 31, CA, applying a dictum of Lord Redesdale LC in *Crofton v Ormsby* (1806) 2 Sch & Lef 583 at 603, who contemplated 40 or 50 years' delay; *Frawley v Neill* (1999) Times, 5 April, 143 Sol Jo LB 98, CA; and see PARA 911 ante. To have this effect the possession of the claimant must be possession under the contract (*Mills v Haywood* (1877) 6 ChD 196, CA), although it may be different where the transaction which brought the proprietary interest into being is disputed (*Joyce v Joyce* [1979] 1 All ER 175, [1978] 1 WLR 1170).

10 See *Lindsay Petroleum Co Ltd v Hurd* (1874) LR 5 PC 221 at 239; *Seddon v North Eastern Salt Co Ltd* [1905] 1 Ch 326; *Leaf v International Galleries* [1950] 2 KB 86, [1950] 1 All ER 693, CA; cf *Mutual Reserve Life Insurance Co v Foster* (1904) 20 TLR 715 at 717, HL (two years allowed); *Molloy v Mutual Reserve Life Insurance Co* (1906) 94 LT 756, CA (six years' limit suggested in case of misrepresentation); and see *Jennings v Broughton* (1853) 5 De GM & G 126; *Cood v Cood* (1863) 33 Beav 314. In cases of fraud, however, there is no laches until the fraud is discovered: *Rolfe v Gregory* (1865) 4 De GJ & Sm 576; *Oelkers v Ellis* [1914] 2 KB 139; *Armstrong v Jackson* [1917] 2 KB 822. See further MISREPRESENTATION AND FRAUD.

11 Such a claim must be made immediately on the facts being known (*Sharpley v Louth and East Coast Rly Co* (1876) 2 ChD 663 at 685, CA; cf *Directors etc of Venezuela Central Rly Co v Kisch* (1867) LR 2 HL 99); and see *Re Russian (Vyksounsky) Ironworks Co, Taite's Case* (1867) LR 3 Eq 795; *Re Scottish Petroleum Co* (1883) 23 ChD 413 at 434, CA; *Re Snyder Dynamite Projectile Co Ltd, Skelton's Case* (1893) 68 LT 210. In *Taylor v Oil and Ozokerite Co Ltd* (1913) 29 TLR 515 at 516 the defence of laches was unsuccessful. See also COMPANIES.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/7. EQUITABLE DEFENCES/(4) UNCONSCIONABLE DELAY ('LACHES')/918. Effect of the Limitation Act 1980.

## **918. Effect of the Limitation Act 1980.**

Certain specified time limits under the Limitation Act 1980<sup>1</sup> do not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any such time limit may be applied by the court by analogy<sup>2</sup> in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1 July 1940<sup>3</sup>; and nothing in the Limitation Act 1980 affects any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise<sup>4</sup>.

<sup>1</sup> See the time limits under the Limitation Act 1980 ss 2, 4A, 5, 7, 8, 9, 24 (as amended): see further LIMITATION PERIODS.

<sup>2</sup> See PARAS 919-920 post.

<sup>3</sup> Limitation Act 1980 s 36(1) (amended by the Administration of Justice Act 1985 ss 57(5), 69(5), Sch 9 para 14; the Defamation Act 1996 s 5(5), (6)).

<sup>4</sup> Limitation Act 1980 s 36(2). It seems that the words 'or otherwise' contained in s 36(2) must refer to laches.

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/7. EQUITABLE DEFENCES/(5) ANALOGY OF STATUTES OF LIMITATION/919. Equity acts on the analogy of statutes of limitation.

## (5) ANALOGY OF STATUTES OF LIMITATION

### 919. Equity acts on the analogy of statutes of limitation.

In certain cases the Limitation Act 1980 applies expressly to equitable claims, as in the case of equitable claims to land<sup>1</sup>; and a court of equity acts in obedience to the statute, and applies, in regard to such claims, the express bar of the statute. Moreover, when claims are made in equity which are not, as regards equitable proceedings, the subject of any express statutory bar, but the equitable proceedings correspond to a remedy at law in respect of the same matter which is subject to a statutory bar<sup>2</sup>, a court of equity, in the absence of fraud or other special circumstances, adopts, by way of analogy, the same limitation for the equitable claim<sup>3</sup>. A claim to an account in equity, absent any trust, has no equitable element; it is based on legal not equitable rights and the Act will apply<sup>4</sup>. Accordingly a claim for an account brought by a principal against his agent is barred by the statutes of limitation unless the agent is more than a mere agent and is a trustee of the money which he received<sup>5</sup>.

While no direct reference to breaches of fiduciary duty is made in the Limitation Acts, in so far as damages or equitable compensation is claimed for an intentional, non-fraudulent breach of fiduciary duty, equity will apply the six-year limit laid down by the Limitation Act 1980<sup>6</sup>.

1 See the Limitation Act 1980 s 18(1) (as amended); and LIMITATION PERIODS vol 68 (2008) PARA 1019.

2 Before the Supreme Court of Judicature Acts 1873 and 1875, courts of equity often had occasion incidentally to decide purely legal rights, for example in adjudicating on the validity of claims for debt brought in under decrees in administration suits. In such cases courts of equity decided all questions, including questions on the statutes, as if the claims were being enforced by an action at law, when there was an analogous legal remedy within some statute of limitation, and were bound to the exact period limited by the statutes, and all the exceptions as to disabilities, acknowledgment, or otherwise applied equally with the mere limitation of time. In cases where there was no analogous legal remedy, courts of equity were, however, bound by no positive rules: *Smith v Clay* (1767) 3 Bro CC 639n; *White v Ewer* (1670) 2 Vent 340; *Bonney v Ridgard* (1784) 1 Cox Eq Cas 145, cited in *Beckford v Wade* (1805) 17 Ves 87 at 97, PC; and see *Hicks v Sallitt* (1854) 3 De GM & G 782; *Thomas v Thomas* (1855) 2 K & J 79; *McDonnell v White* (1865) 11 HL Cas 570. As to the effect of the Supreme Court of Judicature Acts 1873 and 1875 (now replaced by the Supreme Court Act 1981) see *Re Greaves, Bray v Tofield* (1881) 18 ChD 551 at 554; *Gibbs v Guild* (1882) 9 QBD 59 at 67, CA, per Brett LJ; *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co v Sharpe* [1892] 1 Ch 154 at 166, CA; and see PARA 496 et seq ante; and COURTS vol 10 (Reissue) PARA 601 et seq.

3 *Hoverden v Lord Annesley* (1806) 2 Sch & Lef 607 at 632 per Lord Redesdale; and see *Smith v Clay* (1767) 3 Bro CC 639n; *Bond v Hopkins* (1802) 1 Sch & Lef 413 at 429; *Beckford v Wade* (1805) 17 Ves 87, PC; *Marquis of Cholmondeley v Lord Clinton* (1820) 2 Jac & W 1, 141; *Thomson v Eastwood* (1877) 2 App Cas 215, HL; *Rule v Jewell* (1881) 18 ChD 660 at 667; *Allcard v Skinner* (1887) 36 ChD 145 at 186, CA; *Molloy v Mutual Reserve Life Insurance Co* (1906) 94 LT 756, CA. It has been suggested that in such cases courts of equity act in obedience to, and not merely by analogy with, the statute: see *Marquis of Cholmondeley v Lord Clinton* (1821) 4 Bligh 1 at 119, HL. The true principle is that 'where the remedy in equity is correspondent to the remedy at law, and the latter is subject to a limit in point of time by the statute of limitation, a court of equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation; but, if any proceeding in equity be included in the words of the statute, there a court of equity, like a court of law, acts in obedience to the statute': *Knox v Gye* (1872) LR 5 HL 656 at 674 per Lord Westbury; *Paragon Finance plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400, CA, where a distinction is drawn between the two classes of constructive trust in relation to the application of the Limitation Act 1980 (see PARAS 406, 438 ante); *Cia de Seguros Imperio (a body corporate) v Heath (REBX) Ltd (formerly CE Heath & Co (North America) Ltd)* [2000] 2 All ER (Comm) 787, [2001] 1 WLR 112, CA (overruling *Kershaw v Whelan (No 2)* (1997) Times, 10 February); *Clarke v Marlborough Fine Art (London) Ltd* (2001) Times, 5 July, [2001] All ER (D) 189 (May). In cases of fraud, such as fraud committed by the secret



working of underground coal, the period of limitation is not reckoned in equity until the fraud is, or could with reasonable diligence be, discovered (*Ecclesiastical Comrs for England v North Eastern Ry Co*(1877) 4 ChD 845 at 860; *Gibbs v Guild*(1882) 9 QBD 59, CA; and see *Lynn v Bamber*[1930] 2 KB 72); and similarly in cases of mistake (*Brooksbank v Smith* (1836) 2 Y & C Ex 58; *Baker v Courage & Co*[1910] 1 KB 56 at 63). For similar provisions relating to the running of time where claims are based on fraud, concealment or mistake see the Limitation Act 1980 ss 1(2), 10(5), 32 (as amended); and LIMITATION PERIODS vol 68 (2008) PARA 1220 et seq. As to the effect of the Limitation Act 1980 see PARA 918 ante.

4 *How v Earl Winterton*[1896] 2 Ch 626 at 639 per Lindley LJ; *Paragon Finance plc v DB Thakerar & Co (a firm)*[1999] 1 All ER 400, CA.

5 *Burdick v Garrick*(1870) 5 Ch App 233; *Paragon Finance plc v DB Thakerar & Co (a firm)*[1999] 1 All ER 400, CA, disapproving *Nelson v Rye*[1996] 2 All ER 186, [1996] 1 WLR 1378.

6 *Mortgage Corp v Alexander Johnson (a firm)*(1999) Times, 22 September; *Cia de Seguros Imperio (a body corporate) v Heath (REBX) Ltd (formerly CE Heath & Co (North America) Ltd)*[2000] 2 All ER (Comm) 787, [2001] 1 WLR 112, CA (a claim for equitable damages or equitable compensation is a claim for equitable relief to which the Limitation Act 1980 s 36 (as amended) applies).

## UPDATE

### 919 Equity acts on the analogy of statutes of limitation

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force on 1 October 2009: SI 2009/1604).

NOTE 3--See also *P&O Nedlloyd BV v Arab Metals Co* [2006] EWCA Civ 1717, [2007] 2 All ER (Comm) 401 (statutory limitation period for claim in contract applied by analogy to claim for specific performance).

Halsbury's Laws of England/EQUITY (VOLUME 16(2) (REISSUE))/7. EQUITABLE DEFENCES/(5) ANALOGY OF STATUTES OF LIMITATION/920-950. Limits applied.

## 920-950. Limits applied.

Proceedings in equity to recover a simple contract debt are subject to the six years' limit imposed by the Limitation Act 1980<sup>1</sup>; and the same limit applies, perhaps, to equitable remedies which assume the existence of a contract, such as specific performance<sup>2</sup>. Where, however, a claim in respect of personal estate, such as a foreclosure action in respect of mortgaged personal property<sup>3</sup>, was not subject to any statutory period of limitation, equity did not impose a limitation by analogy with the limitation on claims to real estate<sup>4</sup>.

While no direct reference to breaches of fiduciary duty is made in the Limitation Acts, in so far as damages or equitable compensation is claimed for an intentional, non-fraudulent breach of fiduciary duty, equity will apply the six-year limit laid down by the Limitation Act 1980<sup>5</sup>.

1 See the Limitation Act 1980 s 5; *Re Greaves, Bray v Tofield* (1881) 18 ChD 551 at 554; *Re Hollingshead, Hollingshead v Webster* (1888) 37 ChD 651; *Re Chant, Bird v Godfrey* [1905] 2 Ch 225; and LIMITATION PERIODS. As to claims for misrepresentation see *Peek v Gurney* (1873) LR 6 HL 377 at 384, 402; and MISREPRESENTATION AND FRAUD. Secret profit made by an agent or other person in a fiduciary position is recoverable as an equitable debt, and the period, by analogy with the statute, is six years, but it does not run until the facts are discovered: *Metropolitan Bank v Heiron* (1880) 5 Ex D 319, CA; cf *Lister & Co v Stubbs* (1890) 45 ChD 1, CA, doubted in *A-G for Hong Kong v Reid* [1994] 1 AC 324, [1994] 1 All ER 1, PC (see PARA 858 ante). As to secret profit by a director or promoter see *Re Fitzroy Bessemer Steel etc Co Ltd* (1884) 50 LT 144.

2 See *Firth v Slingsby* (1888) 58 LT 481 at 483. In *Talmash v Mugleston* (1826) 4 LJOS Ch 200, however, it was held that specific performance was not subject to the six years' limitation. In practice it is subject to a shorter limitation: see PARA 917 the text and notes 6-9 ante.

3 *Mellersh v Brown* (1890) 45 ChD 225.

4 *Mellersh v Brown* (1890) 45 ChD 225; *Charter v Watson* [1899] 1 Ch 175 at 180-181; *Re Stucley, Stucley v Kekewich* [1906] 1 Ch 67 at 72, CA; *Weld v Petre* [1929] 1 Ch 33, CA. A mortgage on personalty is now governed by the Limitation Act 1980 s 20, but there is no limitation period applicable to the mortgagor's right to redemption of pure personalty (a period of 12 years applies to claims for the redemption of mortgaged land when the mortgagee has been in possession: see s 16). See further LIMITATION PERIODS.

5 See the cases cited in PARA 919 note 6 ante.

---- End of Request ----

Print Request: Selected Items in Table of Contents: (300)

Time Of Request: Wednesday, June 16, 2010 22:46:22